

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS.

CR. NO. 15-4268 JB
15-4269 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8
9
10 VOLUME 2

11 Transcript of Motion Proceedings before
12 The Honorable James O. Browning, United States
District Judge, Albuquerque, Bernalillo County,
New Mexico, commencing on May 10, 2017.

13 For the Government: Ms. Maria Armijo; Mr. Randy
14 Castellano; Mr. Matthew Beck

15 For the Defendants: Mr. Brock Benjamin; Mr. Richard
16 Sindel; Ms. Cori Harbour-Valdez; Mr. Patrick Burke;
17 Mr. Jim Castle; Mr. Robert Cooper; Mr. Roberto
Albertorio; Mr. Orlando Mondragon; Mr. Noel Orquiz;
18 Mr. Nathan Chambers; Mr. Ben Wilson; Mr. Santiago
Hernandez; Mr. Steven Potolsky; Mr. Richard Jewkes;
19 Ms. Amy Jacks; Mr. Josh Spencer; Mr. B. J. Crow; Mr.
Marc Lowry; Ms. Theresa Duncan; Ms. Amy Sirignano;
20 Mr. Christopher Adams; Mr. Michael Davis; Ms. Justine
Fox-Young; Mr. Donovan Roberts; Ms. Erlinda Johnson;
21 Ms. Angela Arellanes; Mr. Samuel Winder; Mr. Wayne
Baker; Ms. Callie Dixon; Mr. Don Kochersberger; Ms.
22 Susan Burgess-Farrell; Mr. Diego Esquibel; Mr. Marc
Grano; Mr. Ahmad Assed; Mr. Gregory Acton; Ms. Marcia
Morrissey

23 For the Defendants (Via telephone): Ms. Carey Bhalla
24
25

1 THE COURT: Good morning everyone.

2 All right. We're going to switch out
3 seating charts here. All right. I think I'll do
4 some things to move things along by subtraction. So
5 this morning we're convening everything, continuing
6 the hearing we had yesterday, except we're not
7 convening 15-4269, so that case will not be called,
8 and that loses a few people. I understand Mr. Villa
9 is not here yet -- not present yet, but he'll be here
10 later today. So we have -- Justine Fox-Young will be
11 back there for Mr. Villa.

12 Ms. Sirignano is not here yet, so Mr.
13 Adams, you're here in place?

14 MR. ADAMS: Yes, sir.

15 THE COURT: Mr. Davidson, you're here for
16 Mr. Garcia?

17 MR. DAVIDSON: Yes, Your Honor.

18 THE COURT: All right. Good morning to
19 you, Mr. Davidson.

20 Anything else?

21 THE CLERK: No, sir.

22 THE COURT: Ms. Fox-Young, you had 90
23 seconds, right? Amazing what a night's sleep will
24 do, right?

25 MS. FOX-YOUNG: Good morning, Your Honor.

1 THE COURT: Ms. Fox-Young.

2 MS. FOX-YOUNG: Yes, Your Honor. I figured
3 that we were almost done with this category of
4 materials on page 20, which is item 4. And we have
5 asked the Government for any handwritten and typed
6 notes of any law enforcement handlers. Yesterday,
7 the Government informed the Court and had informed us
8 that Mr. Acee was one of the law enforcement handlers
9 who worked with Mr. Cordova, and so his notes would
10 be included in that request. We also asked that
11 those notes be accurately preserved and maintained
12 until trial. If the Court doesn't find today that
13 they ought to be turned over, we think that their
14 relevance and materiality might be later determined
15 at trial, and wanted to make sure they're preserved
16 for that purpose.

17 THE COURT: Any problem with the
18 preservation issue, Mr. Beck?

19 MR. BECK: No, Your Honor.

20 THE COURT: So let's preserve them. I
21 guess my thoughts are that probably you need to look
22 at them for Brady and Giglio and Rule 16 information.
23 But those would -- if there is nothing there, I
24 wouldn't be inclined to produce them. But your
25 thoughts?

1 MR. BECK: I think Your Honor has
2 maintained a consistent position in the past, and in
3 this case, that that's the status of the notes is --
4 they're Jencks unless they're Brady, Giglio, Rule 16.
5 So the United States is aware of those holdings of
6 the Court in the past, and will comply with those
7 rulings.

8 THE COURT: We know Mr. Acee is going to
9 testify, so I guess these might be Jencks materials.
10 But at some point they probably will be produced. Do
11 you agree with that?

12 MR. BECK: I agree.

13 THE COURT: So you'll get them 14 days
14 before, unless there is some Brady or Giglio, Rule 16
15 information. Can you live with that, Ms. Fox-Young?
16 And you'll get -- of course, they'll be preserved.

17 MS. FOX-YOUNG: I definitely can, Your
18 Honor. Will the Court also order that that review
19 and disclosure of Brady, Giglio, and Rule 16 happen
20 in, say, 14 days?

21 THE COURT: Can you do that, Mr. Beck?

22 MR. BECK: Well, Your Honor -- and this
23 gets back to what we were discussing yesterday. I
24 think -- respectfully, I think that Giglio should not
25 be produced yet.

1 THE COURT: I did look at this yesterday.
2 And I can't find anything that I have written that's
3 drawn a distinction between Brady and Giglio. But
4 again, if you have something, I'm quite willing to be
5 educated on it.

6 MR. BECK: Yes, Your Honor. And I intend
7 to produce some supplemental briefing on that. I've
8 looked at Your Honor's decisions. And while you
9 haven't -- the Court specifically hasn't drawn that
10 distinction. The Court's quoted from Tenth Circuit
11 decisions -- I'm trying to think -- Johnson, an
12 unpublished decision. And then there is another
13 Tenth Circuit unpublished decision that follows the
14 Court's quotation from Johnson. It starts with an O,
15 and the name is escaping me now. I can find it for
16 the Court later. The Court has quoted Tenth Circuit
17 opinions that have drawn that distinction. And as I
18 said, I intend to -- the United States intends to
19 file some supplemental briefing on that.

20 But I understand the Court's ruling
21 yesterday that, for the time being, we're required to
22 disclose those. So I'd ask the Court to look at
23 those Tenth Circuit decisions. In the meantime, I'll
24 file some supplemental briefing.

25 THE COURT: All right. Well, for the

1 present time, why don't we shoot for 14 days to have
2 your review done?

3 MR. BECK: Understood, Your Honor.

4 THE COURT: Then, if I need to change
5 course -- I think we're getting together again next
6 week, so that will give us time to change course, if
7 we need to. But let's plan on that.

8 What else, Ms. Fox-Young?

9 MS. FOX-YOUNG: Your Honor -- and numbered
10 them 5 on page 20, continuing into the next page, we
11 asked for any documentation and/or correspondence of
12 any kind between the FBI or other law enforcement
13 with NMDOC officials, to include STIU, or anybody
14 else, regarding Billy Cordova possessing contraband
15 items, including recording devices or phones.

16 And the Court got a little bit of a sense
17 yesterday of some of the context for this request,
18 understanding that Mr. Cordova and other informants
19 used in this case have been supplied with hand-held
20 devices, hand-held recorders. Ms. Duncan talked
21 about cellphones that, apparently contrary to NMDOC
22 rules and the regulations, have been in some way
23 brought into facilities and used in the investigation
24 of counts in this case. So we ask for the
25 aforementioned materials -- we think that they're

1 highly material. They pertain directly to the
2 voluntariness of Mr. Perez' alleged statements, the
3 nature of the recording devices and the way the
4 recordings were made. And they're also --
5 potentially they go to -- I think likely -- very
6 likely -- go to impeaching Mr. Cordova, if he, in
7 fact, in some way violated NMDOC rules in bringing in
8 a recording device. So we ask for that whole
9 category of documentation, of correspondence, on Mr.
10 Cordova's contraband during this period.

11 THE COURT: Well, we had a similar issue
12 last week with Chris Garcia and the phone, and that
13 situation. And I think I pretty much denied the
14 request there. I guess I'm just having a hard time
15 seeing, you know, how you would use that information.
16 It seems to me it's a recorder, it's not a phone. So
17 the regs and statutes that relate to that -- and even
18 if they do, that's a violation of state law -- I
19 guess I'm having a hard time figuring out why we'd be
20 concerned about it in federal court.

21 Your thoughts on that?

22 MS. FOX-YOUNG: Well, I mean, beginning
23 with the phone, if the Court concedes that there
24 would be a violation to having a phone inside, and it
25 would be classified as contraband --

1 THE COURT: If I understood the testimony
2 last week as far as the phone, the warden of the
3 prison pretty much has carte blanche discretion to
4 allow a phone into the facility. So I guess I'm
5 having a hard time figuring out what difference it
6 makes how it got there. If you want to argue at
7 trial that it shouldn't have been there, then I guess
8 you can.

9 MS. FOX-YOUNG: Well, Your Honor,
10 respectfully, I think the Government would submit, if
11 the warden had let the item in, there wouldn't be any
12 correspondence about contraband in Mr. Cordova's
13 possession. So, in that case, there wouldn't be any
14 material to turn over. But if Mr. Cordova did
15 possess contraband, and there is documented evidence
16 of that, and there is correspondence about it, I
17 think we're entitled to it.

18 THE COURT: Why? Tell me why, though.

19 MS. FOX-YOUNG: Because it's impeachment as
20 to how he got it in. I mean, perhaps the Government
21 provided him with the phone. And, yes, we'll learn
22 that upon cross-examination any number of times. But
23 perhaps the Government didn't provide him with a
24 phone. Perhaps he was otherwise recording
25 conversations, and himself smuggled the phone in. I

1 mean, it certainly has been known to happen. If that
2 didn't happen, you know, there probably isn't
3 correspondence about contraband.

4 THE COURT: All right. Mr. Beck, are you
5 handling this portion?

6 MR. BECK: I am, Your Honor.

7 I guess it sounds like this request is
8 broader than I read it. I also read this -- as the
9 issues we discussed and litigated in the Garcia
10 case -- to the extent that there is contraband, I
11 guess, correspondence or reports or documentation
12 regarding contraband, I guess that would be -- I
13 guess that would be produced as Giglio in his NMCD
14 file, or Giglio, whenever that comes about.

15 I think Your Honor is correct, that in the
16 Garcia case it was determined because law enforcement
17 provided those phones, the warden authorized it, that
18 they weren't contraband under the statute. So I
19 think that holds true in this case.

20 Certainly, cross-examination will bring
21 that out. But I think Your Honor's leanings and
22 tending to deny this request is correct.

23 THE COURT: I'll take a look at the
24 materials for Giglio and Brady material. I'm sitting
25 here trying to put my feet in the shoes of the

1 defense lawyers. And I'm just having a hard time
2 figuring out how that would be helpful. But you're
3 looking at the materials, so you take a look at them.
4 And I'd like to have an attorney look at them, stare
5 at them, and see if they see any Brady, Giglio, or
6 Rule 16, anything that's helpful to the other side.

7 Anything else on that, Ms. Fox-Young?

8 MS. FOX-YOUNG: Your Honor, will you also
9 order that review happen in 14 days?

10 MR. BECK: No objection to that, Your
11 Honor.

12 THE COURT: All right. So ordered.

13 MS. FOX-YOUNG: Your Honor, the last
14 category that we'll address with the Court is on page
15 21 of our motion. We asked for Mr. Cordova's pen
16 pack and STIU file. We are, the defense believes,
17 entitled to know, as I've already said, the manner by
18 which Mr. Cordova may have obtained any materials he
19 used in eliciting recorded statements. And that
20 information, among other information, may be gleaned
21 from his pen pack and his STIU file.

22 It's also -- as I think the Court has
23 become very familiar with the contents of pen packs
24 and STIU files, based upon prior argument and prior
25 orders -- it is sort of classic impeachment material.

1 Any disciplinary matters involving Mr. Cordova, his
2 past felonies, would exist in the pen pack. But the
3 STIU file will contain, you know, records of any
4 discipline. He continues to remain in custody. And
5 certainly, you know, during the period that he was
6 recording -- allegedly recording Mr. Perez -- we're
7 entitled to know if he was committing infractions, if
8 he was getting in trouble, if he was bringing in --

9 THE COURT: I think Mr. Beck may be about
10 to make a concession. Mr. Beck?

11 MR. BECK: Yeah, your Honor, I think this
12 falls into the category that we've discussed, the
13 14-day Giglio review. And if Your Honor is ordering
14 us to disclose it, we'll disclose it. I think Ms.
15 Fox-Young is right.

16 THE COURT: Well, here's the thing, I think
17 it's going to be chockful of stuff that, if he's
18 going to be called as a witness, that they're
19 probably going to get.

20 MR. BECK: Right.

21 THE COURT: So do you want to fight over
22 the file, or do you want to go through and do a
23 Giglio and Brady review, before you just turn over
24 the file?

25 MR. BECK: I guess, in Your Honor's wisdom,

1 we'll just turn it over.

2 THE COURT: Okay.

3 MS. FOX-YOUNG: Your Honor, is that both
4 the pen pack and the STIU file?

5 MR. BECK: It is, Your Honor.

6 MS. FOX-YOUNG: And is that a 14-day
7 disclosure?

8 MR. BECK: Fourteen days is fine.

9 MS. FOX-YOUNG: Okay. And the final item
10 is on page 22. We've come to an agreement. The
11 Government is going to permit us to access Southern
12 and PNM Level 6, including the locations where Mr.
13 Perez was housed at PNM Level 6. And we'll go ahead
14 and get that set up with the Government.

15 THE COURT: Is that correct, Mr. Beck?

16 MR. BECK: That's correct, Your Honor.
17 We're coordinating that presently.

18 THE COURT: All right. Anything else, Ms.
19 Fox-Young?

20 MS. FOX-YOUNG: Your Honor, I can take up
21 the next motion quickly, if the Court would like to
22 take it up, the motion to unseal?

23 THE COURT: Okay. Let me make sure I get
24 the right ones here.

25 MR. DAVIS: Michael Davis on behalf of

1 Carlos Herrera. I had filed a joinder. There is one
2 specific item of discovery that I was going to
3 address the Court on.

4 THE COURT: This is in the motion to compel
5 that we just argued?

6 MR. DAVIS: Yes, sir, it's in 1037.

7 THE COURT: All right.

8 MR. DAVIS: I apologize. If I could just
9 have a few minutes.

10 THE COURT: All right. Go ahead.

11 MR. DAVIS: Thank you, Judge. Just, by way
12 of background, if the Court recalls, Mr. Herrera has
13 been charged in Counts 6 and 7, as being involved in
14 the murder of Javier Molina. It's also clear that he
15 was not in the same pod where Mr. Molina was
16 murdered. And it appears that he's clearly not
17 directly involved in the murder. It appears to be
18 the Government's theory -- basically two-fold -- one
19 is that he holds some sort of a leadership capacity
20 in SNM; and two, that based on that, he somehow gave
21 a nod or somehow sanctioned what was to be done with
22 Mr. Molina.

23 And, in the course of this, there is Billy
24 Cordova recordings involving Mr. Herrera as well,
25 that were done at PNM South. And so we joined in all

1 the arguments that Ms. Fox-Young and Ms. Duncan
2 raised yesterday. We don't have any additional
3 argument with regard to all of those issues except
4 for a couple.

5 First off, I think there are recordings --
6 Billy Cordova recordings -- with Mr. Herrera that
7 there may be transcripts of that we haven't received.
8 I may be wrong about that. I haven't discussed that
9 specifically with the Government. But our review, I
10 feel there are some transcripts that we haven't
11 received, and we ask those to be provided.

12 The next thing, Judge --

13 THE COURT: Don't we take them one at a
14 time here. And --

15 MR. BECK: Obviously, Ms. Armijo can speak
16 to this better than I, but I'll try my best. If
17 there are transcripts, I think we produced them. If
18 not, we'll produce them. And there may be some that
19 don't have transcripts. But we don't object to that
20 request.

21 THE COURT: All right. Does that satisfy
22 you on that, Mr. Davis?

23 MR. DAVIS: Yes, Judge.

24 Judge, the other thing -- and this is very
25 brief -- is that when we were at the November 29

1 hearing, this issue came up as to how Mr. Herrera was
2 involved in this. And Ms. Armijo said there is a
3 audio recording where Mr. Herrera is purported to
4 have admitted to his involvement in the murder, some
5 sort of a confession, I would say they intend to
6 use -- I guess in one of the Billy Cordova recordings
7 or some other recording. We have repeatedly asked
8 the Government to provide us a copy of that. We have
9 reviewed all the audio recordings concerning Mr.
10 Herrera, and we cannot find any such statement. And
11 we have asked the Government to provide that to us.
12 It would be Rule 16. Obviously, it's crucial to our
13 case. And so we'd ask the Court to order the
14 Government to provide that, if it, in fact, exists.

15 THE COURT: Well, my impression from that
16 conversation -- and correct me if I'm wrong -- is
17 that maybe Ms. Armijo backtracked a little from her
18 characterization of it. She did say -- or I thought
19 she confirmed that the transcript and the recording
20 that she was characterizing as a concession, or
21 confession, had been produced; confirmed that, and
22 there was no more to be produced. Is my memory off,
23 Mr. Beck?

24 MR. BECK: That's right, Your Honor.

25 THE COURT: So you have it. I think it was

1 the heat of argument. And she characterized it, but
2 there is no more to be produced; is that correct?

3 MR. BECK: That's right, Your Honor. And I
4 think what Mr. Davis is asking is for us to point him
5 specifically to the recording. And I don't have a
6 problem working with him to do that.

7 THE COURT: Okay. So he'll tell you which
8 recording they're characterizing. But you have it.

9 MR. DAVIS: Just to clarify, I don't think
10 that's what she said. I'm sorry I don't have the
11 transcript in front of me. Because I remember a
12 similar allegation was made by the Government
13 concerning Mr. Baca. And I remember Mr. Lowry and I
14 both were surprised to hear this, because we weren't
15 aware of any of these recordings where a confession
16 was made. Obviously, that's a fairly crucial piece
17 of evidence. I sent emails to the Government. They
18 were going to look for it. At some point, and
19 provide it to me. And I've never seen it. I certainly
20 have no problem continuing to work with them on that.
21 But I want to alert the Court that they did make the
22 reference. But we haven't seen it. We don't believe
23 it exists.

24 THE COURT: Maybe by the next hearing next
25 week, could you just send a letter -- email -- to

1 Mr. Davis telling him which transcript or recording
2 Ms. Armijo was referring to?

3 MR. BECK: I said I would, Your Honor, and
4 I will.

5 MR. DAVIS: Thanks, Judge.

6 THE COURT: Thank you, Mr. Davis.

7 All right. Ms. Fox-Young. Let me get
8 organized here, but can you come back up to the
9 podium. Let me get my materials. Ms. Jacks,
10 Mr. Jewkes, y'all had joined that series of motions
11 as well. Do y'all have anything else on that before
12 we move on?

13 MS. JACKS: We don't have anything
14 additional. Thank you.

15 THE COURT: All right. Thank you, Ms.
16 Jacks.

17 So you want to unseal the motions we just
18 argued; is that correct, Ms. Fox-Young?

19 MS. FOX-YOUNG: That's correct, Your Honor.

20 THE COURT: And the reason for that is?

21 MS. FOX-YOUNG: The first general reason is
22 that, as this Court has noted there is a general
23 presumption against filing pleadings sealed.
24 Additionally, we believe that any cooperating witness
25 discussed in the motion -- and I think --

1 THE COURT: Let me ask this: Y'all didn't
2 file a response. Do you oppose this motion?

3 MR. BECK: Your Honor, I just -- what I
4 have -- and I think what the Government has an issue
5 with is that we come in yesterday, and we talk for
6 hours and hours about how we have to have everything
7 on tablets so there is no paper in the facilities.
8 The reason for that is cooperator statements. And
9 then we talked about how all the defendants want the
10 tablets so there is no paper in the facilities for
11 cooperator statements. And then now, we want
12 unsealed documents that refer to cooperator
13 statements.

14 So it seems to me we're talking out of the
15 both sides of our mouths. So we'd appreciate it if
16 they were consistent on that.

17 Since we've already talked about the
18 informant in this case, we don't oppose unsealing it,
19 because, effectively, it's there, it's unsealed. So,
20 to answer Your Honor's question, no, I just think
21 that everyone should remain aware of what's going on
22 in this case, and the threats out there and the
23 dangers out there. And I know everyone is. Just --
24 the inconsistency troubles me. So to answer Your
25 Honor's question, we don't oppose it. And you may

1 grant the motion.

2 THE COURT: All right. So I will grant
3 that motion. You know, in a case like this, it's hard
4 to be consistent. And sometimes we don't -- we're
5 just not going to be able to -- we're
6 across-the-board trying to make lots of
7 individualized decisions. And some of them are going
8 to look a little inconsistent at times. But some of
9 the material is out in the public; some of it's not.
10 And we'll try to be careful with everybody. But I'll
11 grant that motion.

12 MS. FOX-YOUNG: Your Honor, I mean, this is
13 going to come up again and again. But, generally,
14 it's our position that if witnesses are going to be
15 testifying at trial, we should be able to file public
16 motions and conduct public hearings with regard to
17 any argument. And so it's been a practice in the
18 case -- I think because there is a protective order
19 in place, a lot of counsel are filing motions sealed
20 where there is any mention of the discovery, where
21 there is any mention of any witnesses. And I just --
22 I think that's contrary to some of the Court's
23 earlier directives; that the presumption should be
24 that the documents be filed unsealed. Obviously, if
25 there is a protective order specifically in place

1 addressing a particular CS, you know, that material
2 needs to be filed sealed, unless there is some other
3 way that the information is public.

4 But I just wanted to bring that to the
5 Court's attention, because we're filing a lot of
6 documents sealed, and then we have to file our
7 joinder sealed. And then we come in here and have a
8 public hearing.

9 THE COURT: Well, we'll just have to take
10 them one at a time. I mean, there may come a time
11 when not a whole lot, as we barrel toward -- and get
12 into the trial. But a lot of it is not going to be
13 sealed. But I think we're just going to have to take
14 these issues one at a time. There may be things the
15 Government knows and needs to protect. And we put in
16 place a method. It's working. It's cumbersome to
17 some degree. But I think we're working.

18 Do you want to say anything on that, Mr.
19 Beck?

20 MR. BECK: I do, Your Honor. That
21 presumption case law says it's overcome when there is
22 an interest in getting the witnesses to testify at
23 trial. And that's the case here. We have these
24 cooperators, witnesses, whatever you want to call
25 them, protected so that they may testify at trial.

1 And I think there is a great concern, and it
2 overcomes the presumption in this case.

3 And so I would ask -- not necessarily the
4 Court -- but I'd ask everyone in this room that when
5 we're talking about sealed documents, if we seek to
6 unseal them, that we do that before we talk about the
7 motions. Instead of like this case, where we talked
8 about the sealed document, and outed a cooperator
9 who, granted, has been outed before, whether it be
10 incidentally. But going forward, I would ask that we
11 talk about motions to unseal before we talk about the
12 sealed documents.

13 THE COURT: All right. I'll try to be more
14 careful on that, too. Sometimes, like Ms. Fox-Young
15 says, everything is sort of sealed, but nobody is
16 sensitive about it. So help me out, if we're about
17 to argue something, raise my attention. And I'll try
18 to be more careful about that as well.

19 MS. FOX-YOUNG: Thank you, Your Honor.

20 THE COURT: All right. Anything else, Ms.
21 Fox-Young?

22 MS. FOX-YOUNG: No, Your Honor.

23 THE COURT: All right. Thank you, Ms.
24 Fox-Young.

25 All right. I think that what's next up is

1 Mr. Gonzales' motion for a bill of particulars. Ms.
2 Johnson. Who is going to be arguing this for the
3 Government? Mr. Castellano, why don't y'all come up
4 here with Ms. Johnson, why don't y'all just come up
5 here together. And I'll certainly hear anything
6 anybody wants to say on this motion. But let me ask
7 a few questions here at the beginning. You got your
8 materials, Mr. Castellano?

9 MR. CASTELLANO: Yes, Your Honor.

10 THE COURT: All right. It seemed to me the
11 only specific question I could glean from your
12 materials that you wanted to know is when Mr.
13 Gonzalez joined the SNM Gang, when the Government
14 contends that he joined the SNM Gang. You may have
15 more. But let's start with that one. That is one of
16 the ones that you wanted; correct?

17 MS. JOHNSON: That is, Your Honor. And
18 more importantly, obviously, as the Court is aware,
19 one of the elements pursuant to 18 USC 1959 that the
20 Government has to prove is that the defendant had, or
21 was seeking a position in the enterprise. Another
22 element is that the defendant's general purpose in
23 committing the crime of violence was to maintain or
24 increase his position in the enterprise, or was in
25 consideration for the receipt of anything of value.

1 That is actually the crux. And I made -- I
2 think I articulated it better in my reply. I have
3 gone through the discovery. My investigator has gone
4 through the discovery. And as the Court knows, it's
5 voluminous. There is absolutely no evidence that we
6 could find that would point to us that Mr. Gonzalez
7 engaged or participated in this crime of violence in
8 order to maintain or increase his position in the
9 enterprise. That's a key element, Your Honor.

10 And the Court in U.S. versus Aispuro, which
11 is the case that I, along with other counsel in this
12 courtroom, had before this Court, ordered the
13 Government to provide --

14 THE COURT: Well, let's -- I read the
15 briefing, and y'all are pretty good about pointing
16 out my cases.

17 Let's just take the first question first.
18 Mr. Castellano, do you have any more specific
19 information that you'd be able to give as far as the
20 date that Mr. Gonzalez joined the SNM Gang?

21 MR. CASTELLANO: I don't have a specific
22 date, Your Honor. What I can tell the Court is my
23 understanding is that he's an 18th Street Gang
24 member. There are a few other SNM members who are
25 from the 18th Street Gang. And that's a feeder gang

1 for the SNM. So, as an 18th Street member, he could
2 either be a member or an associate of SNM Gang.

3 THE COURT: Do you have any particular
4 documents that you would point to that give Ms.
5 Johnson that information?

6 MR. CASTELLANO: I don't know if I do, Your
7 Honor. I wasn't ready to address that question this
8 morning, since it was just strictly the bill of
9 particulars. So it may be in a debrief report or
10 something else. But right offhand, I'm not aware of
11 that.

12 THE COURT: Ms. Johnson, address your
13 question to me, but what question would you want the
14 Government to answer; given that you're not going to
15 get a whole lot more from them, maybe a document or
16 Bates number, what else would you want?

17 MS. JOHNSON: With regard to this
18 particular element, Your Honor?

19 THE COURT: Well, if you're done with that
20 element, you're free to move on to another element.

21 MS. JOHNSON: And I appreciate that, Your
22 Honor. I'm sure the Court will be seeing a motion in
23 limine on this issue, because I think we're doing a
24 lot of speculation here in terms of what the
25 Government's position is, and a lot of conclusions

1 being drawn. But we'll address that in a motion in
2 limine.

3 THE COURT: Okay. What's your next -- what
4 would be your next question that you would want with
5 a bill of particulars?

6 MS. JOHNSON: Your Honor, it's the other
7 element that I addressed. And that is --

8 THE COURT: What did Mr. Gonzalez get out
9 of being in the gang or committing the crime?

10 MS. JOHNSON: Committing the crime, Your
11 Honor. And specifically I cited to U.S. versus
12 Jones, which set out nicely the elements required
13 under 18 USC 1959. One is that the defendant had, or
14 was seeking a position in the enterprise. And the
15 other element is that -- and they're somewhat
16 intertwined -- that the defendant's general purpose
17 in committing the crime of violence was to maintain
18 or increase his position in the enterprise. Or he
19 was in consideration for the receipt of anything of
20 value.

21 And it's not sufficient for the Government
22 to get up here, Your Honor, and say -- just as they
23 did now -- well, he's an 18th Streeter, and by
24 conclusion, it's a feeder gang to SNM. There is
25 absolutely no evidence that shows that, Your Honor.

1 None whatsoever. And then also I expect them to say,
2 Well, he was acting at the behest, allegedly, of Joe
3 Gallegos, and therefore, he was seeking a position in
4 the enterprise, or to maintain a position. There is
5 no evidence. Absolutely none whatsoever.

6 THE COURT: Well, I do think it's helpful
7 to know exactly what their theory is with Mr.
8 Gonzalez.

9 Mr. Castellano, Ms. Johnson sounds like she
10 knows what your theory is. But do you want to
11 elaborate as to what your theory is against Mr.
12 Gonzalez?

13 MR. CASTELLANO: Not really, Your Honor.
14 The case law on bill of particulars states that the
15 Government does not have to give its theory, and that
16 the bill of particulars isn't a fishing expedition.
17 But the Government's theory --

18 THE COURT: I'm trying to decide whether
19 it's worth ordering the Government to be more
20 particular here. So I guess I'd like to hear your
21 theory against Mr. Gonzalez.

22 MR. CASTELLANO: Well, I'll note my
23 objection for the record, Your Honor. The case law
24 says that's not the purpose of a bill of particulars.
25 But to answer your question, not only does it count

1 to violate the statute, it also counts to be an aider
2 and abettor, in violation of the statute. So he
3 could have aided and abetted any of these people to
4 violate the VICAR statute. One of the documents Ms.
5 Johnson gave yesterday has a statement indicating
6 that Gutierrez, Shauna Gutierrez told Brandy
7 Rodriguez, Rivera, and Gonzalez to get over to the
8 house and take care of Gomez. And the other
9 statements indicate that there was concern that
10 Gomez, the victim, was going to be a witness against
11 Joe Gallegos. And so that is one of the allegations
12 in the indictment, is that -- witness intimidation is
13 one of the things that the racketeering activity
14 covers.

15 THE COURT: Is that primarily what your
16 case is of Mr. Gonzalez, is witness intimidation?

17 MR. CASTELLANO: Yes. Part -- there is in
18 the second superseding indictment a count of witness
19 tampering, which is Count 16.

20 THE COURT: So that's mostly what Gonzalez
21 is in for?

22 MR. CASTELLANO: Yes. And as a gang
23 member, that would be one of the things you do is you
24 take care of snitches. And so that is something that
25 is expected of you by membership in an organization.

1 THE COURT: Is it this one witness, though,
2 that is going to be the proof at trial? The case
3 against him, this one witness that's --

4 MR. CASTELLANO: At this point, we have the
5 victim and one cooperating defendant.

6 THE COURT: Okay. And the victim is the
7 one witness; so that's the case against Mr. Gonzalez?

8 MR. CASTELLANO: No. The cooperating
9 witness -- so there is the victim and a cooperating
10 witness. So there are two.

11 THE COURT: You're going to allege that --
12 you're going to argue that he intimidated both of
13 them?

14 MR. CASTELLANO: No. The victim will tell
15 us what happened to him, and the cooperating witness
16 will tell us the reasons behind the assault.

17 THE COURT: But the case against Mr.
18 Gonzalez is that he intimidated one witness? You
19 have two witnesses to testify about that?

20 MR. CASTELLANO: That's correct.

21 THE COURT: And you know the name of the
22 victim?

23 MS. JOHNSON: Yes, Your Honor.

24 THE COURT: And you know the name of the
25 cooperator.

1 MS. JOHNSON: Yes, Your Honor. And I think
2 that what we're doing -- this is sort of a
3 tautological argument. I don't believe that -- we
4 know what the evidence is; that this individual was
5 beaten. But, obviously, the Government needs to
6 prove the additional elements that I think are
7 deficient. And I can't find any evidence in the
8 discovery.

9 And I wanted -- if I may, Your Honor --

10 THE COURT: How, then, would a bill of
11 particulars help you? I mean, if you're prepared to
12 punch holes in the Government's case because they
13 don't have witnesses -- and one of the things that
14 these cases -- my cases have pointed is, you know, I
15 look at the evidence that's been produced. I mean,
16 sometimes these bill of particulars come early in a
17 case, where a defendant is really scrambling to
18 figure out what the charges are. But in this case,
19 it may not be a robust case from your viewpoint, but
20 that's it. I'm wondering what a bill of particulars
21 would do to help you.

22 MS. JOHNSON: Well, Your Honor, as the
23 Court pointed out, under United States v. Ivy, which
24 is the Tenth Circuit opinion at 83 F.3d 1266, at page
25 1281, "A defendant is entitled to the theory of the

1 Government's case," as the Court just queried the
2 Government. So the issue is not whether --

3 THE COURT: It seems to make sense. It may
4 not have any support in the evidence, but I mean,
5 it's a coherent theory.

6 MS. JOHNSON: And I understand, Your Honor.

7 But what we're doing here -- what the
8 Government is doing is they're leaping to
9 conclusions.

10 And I want to just give the Court a little
11 bit of a preview of how the Government, and
12 particularly the investigators in this particular
13 case, leaped to conclusions without evidence.

14 And this goes back to my first request on
15 the association or membership of Mr. Gonzalez in the
16 SNM. So in United States v. Ramon Phillip Baca,
17 which was a case before Judge Herrera, Mr. Baca was
18 charged in a stand-alone drug case, he pled, was
19 sentenced, and was on his way to BOP with a
20 designation as an associate of SNM, which he has
21 never been. And so I asked the Government counsel in
22 that case to please remove that designation because
23 it was not supported. That attorney contacted Agent
24 Acee, who then responded, and I was provided with a
25 copy of the response. And his conclusion as to why

1 Mr. Baca was an associate of the SNM was that because
2 one of his uncles was a founding father of the SNM.
3 By that familial association, Mr. Baca was then an
4 associate of the SNM for life.

5 Your Honor, I'm concerned here we're going
6 to have issues of the Government leaping to
7 conclusions, unfounded conclusions, about membership,
8 more importantly association in the SNM by
9 Mr. Gonzalez. And I think that the Court needs to
10 hold the Government's feet to the fire, and have them
11 produce evidence of how Mr. Gonzalez is an associate
12 of the SNM; when this happened; what evidence
13 supports this association. And then, with regard to
14 the other element that he committed this offense to
15 maintain a position, the fact that he committed the
16 offense, he could have had a beef with Mr. Gomez,
17 because he's a child molester. But not because he
18 was doing it in order to assist the SNM. So again,
19 this goes back to my argument, Your Honor. His
20 participation in this offense, beating Mr. Gomez,
21 doesn't get the Government a 1959 conviction. And I
22 think that their indictment tracks the statutory
23 language.

24 And we have volumes of discovery, thousands
25 of -- tens of thousands of pages of discovery. And

1 I'd ask that the Court order the Government to narrow
2 that and tell the defense in this case the theory of
3 the Government's case as to -- particularly as to
4 those two elements -- without these unfounded
5 conclusions by an agent in this case.

6 THE COURT: All right. Thank you, Ms.
7 Johnson.

8 Mr. Castellano.

9 MR. CASTELLANO: Well, Your Honor, she's
10 talking about the strength of the Government's case
11 in her opinion. That's really her closing argument.
12 That's not the basis of a bill of particulars. And
13 she's announced she's ready for trial. What she's
14 telling the Court is that she's not ready for trial.
15 And that's a different topic altogether.

16 So I think, once again, this is not the
17 subject of a bill of particulars. She has plenty of
18 discovery. The case law says that the indictment, if
19 it tracks the language of the statute, informs the
20 victim -- or the defendant of what the charges are,
21 when they occurred, where they occurred. And it's
22 supplemented by discovery, and that's sufficient, and
23 that defeats the motion for a bill of particulars.

24 MS. JOHNSON: Your Honor, the whole purpose
25 of the bill of particulars was to --

1 THE COURT: Were you done, Mr. Castellano?

2 MR. CASTELLANO: Yes, I'm done, Your Honor.

3 THE COURT: All right. Ms. Johnson.

4 MS. JOHNSON: I apologize.

5 Your Honor, the whole purpose of the bill
6 of particulars is to avoid surprise at trial. So if
7 that's all they have, well, okay, that's all they
8 have. But, Your Honor, they are deficient in the
9 elements and in the evidence, and according to the
10 case law which the Court cited in -- and did a very
11 thorough analysis in US versus Aispuro, we're
12 required to know what facts support these legal
13 elements. And that's why, Your Honor, I think it's
14 important to order the Government to provide the
15 defense a bill of particulars, particularly on those
16 two requisite elements.

17 THE COURT: All right. Thank you, Ms.
18 Johnson.

19 Well, I don't want the defendant surprised.
20 But I guess I would take, from your representations,
21 Mr. Castellano, every document that you got related
22 to Mr. Gonzalez, what you're going to use to prove
23 the case, is in the possession of Ms. Johnson?

24 MR. CASTELLANO: I believe so, possibly
25 with the exception of Jencks statements, Your Honor.

1 THE COURT: But you've looked at those?
2 There is no Brady, Giglio, or anything material
3 there, so there is nothing that you made a
4 determination is going to be helpful to her?

5 MR. CASTELLANO: I don't believe so, Your
6 Honor. But I will review those again.

7 THE COURT: Well, I'm not inclined to grant
8 a bill of particulars. You've got a ton of
9 documents. I think you and I have a good feel as to
10 what the case against Mr. Gonzalez is. I think we
11 know what the holes are. The Government has got to
12 know its strengths. There is not much more I can do.
13 it's not a civil case where I can have a summary
14 judgment or is a motion to dismiss.

15 So I'm not going to grant a bill of
16 particulars. I think in this case people have a
17 pretty good idea what they're going to trial on. So
18 I'm going to deny the motion.

19 MS. JOHNSON: Thank you, Your Honor.

20 THE COURT: Thank you, Ms. Johnson. All
21 right. Ms. Johnson, I think the next one is yours as
22 well. It's the amended motion for an order to compel
23 specific discovery. If you want to take that up.

24 MS. JOHNSON: Motion to sever, Your Honor?

25 THE COURT: No, this is the amended

1 motion -- you want to argue that again, huh? You're
2 beating the dead horse, aren't you?

3 MS. JOHNSON: You said we could still
4 continue to beat it.

5 THE COURT: Do you want to argue the
6 amended motion for an order compelling specific
7 discovery?

8 MS. JOHNSON: Yes, Your Honor. I believe
9 that the items are limited and addressed in the
10 reply, because we have since received some of the
11 items that were addressed in the motion to compel.

12 So what we're down to, Your Honor, the
13 first one is the disclosure of DNA and fingerprint
14 evidence from a machete that was seized by officers.

15 So, in this particular case, Your Honor, on
16 February 26, 2016, as the Court is aware from the
17 allegations, Jose Gomez was beaten at the home of a
18 woman by the name of Charlene Parker Johnson. And
19 the allegations are that -- well, they vary here --
20 that the reason for the beating was at the behest of
21 Joe Gallegos, according to the Government's evidence,
22 or the Government's position, I should say. So then,
23 according to Mr. Gomez' -- one of his numerous or
24 varying versions of the events was that he was hit on
25 the head with a machete by Mr. Gonzalez, and then by

1 another object by Mr. Rivera. Mr. Gomez managed to
2 run away. And a few days later he claims that he was
3 chased by some individuals in a van. And Valencia
4 County Sheriff's Deputies responded to the call, and
5 a van was eventually located, and a machete was
6 allegedly found in the van. The machete was
7 processed for DNA and fingerprint evidence. I expect
8 the Government will try to introduce that machete,
9 and try to argue that that was the machete that was
10 used in the beating of Mr. Gomez.

11 The report from Valencia County Sheriff's
12 Department indicates that, as I said, the machete was
13 processed for DNA and fingerprints.

14 The FBI actually responded very quickly,
15 and interviewed Mr. Gomez, and essentially took over
16 the investigation. Your Honor, what we are asking
17 are for the results of the DNA testing and the
18 fingerprint evidence, because we are 100 percent
19 confident Mr. Gonzalez' DNA, nor his fingerprints,
20 will be found on the machete. And we would submit to
21 the Court -- and this is not just speculative; I'm
22 100 percent confident that his DNA and fingerprint
23 evidence will not be on that machete. So this is
24 clearly Brady evidence.

25 The Government's position is that, Well,

1 we're washing our hands of it. It's in state
2 custody. It's not our duty to have these things
3 tested. Your Honor, because they've adopted this
4 case -- they're working with state officials; this is
5 a joint investigation with state officials -- the
6 Government is required, and now the duty is imposed
7 on the Government to provide this evidence. I would
8 ask that the Court order the Government to provide
9 this DNA evidence and this fingerprint evidence to
10 the defense, obviously, forthwith.

11 The other item that we are requesting --

12 THE COURT: Why don't we take them one at a
13 time.

14 All right. Ms. Armijo.

15 MS. ARMIJO: Your Honor, we have requested
16 that -- although it may have been processed for DNA,
17 it wasn't submitted for DNA analysis. We made that
18 request of the state some time ago, and we are
19 checking to see if the results are back in. We
20 certainly will turn them over once we do. But we
21 made that request of the state. But she's probably
22 right. We don't think that this is the machete that
23 was used. So while she stands there and says "100
24 percent," and believes we're going to say it's the
25 machete, we're not going to say it's the machete.

1 THE COURT: You don't have the machete?
2 You're not planning to introduce it at the present
3 time?

4 MS. ARMIJO: We don't believe that that's
5 the machete that was used.

6 THE COURT: So you're not planning to
7 introduce that one?

8 MS. ARMIJO: No. Unless something comes
9 back that we don't -- but we don't believe it's the
10 machete. We have made the request for the DNA. When
11 we get the response back from Valencia County, we
12 will certainly inform defense counsel of where they
13 are with that. But we're not saying that's the
14 machete.

15 THE COURT: You may not want to mess with
16 that machete.

17 MS. JOHNSON: All right. Well, then --

18 THE COURT: Leave that alone.

19 MS. JOHNSON: -- that answers that, Your
20 Honor. So in order to avoid a motion in limine, is if
21 the Government agreeing that they will not be
22 introducing any evidence of this machete in this van?

23 THE COURT: I think we have a
24 representation at the present time you don't intend
25 to do that; correct?

1 MS. ARMIJO: We don't plan to say this
2 machete was used in it, yes. Unless there is some
3 other relevance to it, which I can't think of right
4 now. But certainly if it becomes an issue, we would
5 inform defense counsel.

6 THE COURT: Okay.

7 MS. JOHNSON: That answers that then.
8 Thank you.

9 The next item, Your Honor, is written
10 statements to the FBI by Brandy Rodriguez and Paul
11 Rivera. Now, while I understand that the Court can
12 order the Government to provide this Jencks material
13 now, the Court can encourage the Government to
14 perhaps release them, or provide them, disclose them
15 early, earlier than just right before trial. But
16 more importantly, Your Honor, I would submit to the
17 Court that these statements contain Brady information
18 as to Mr. Gonzalez, particularly as to some of these
19 elements that the Government is required to prove.
20 I'd ask that the Court direct the Government to
21 carefully inspect these for Brady impeachment
22 material, and order them to disclose them to the
23 defense if they contain that information.

24 MS. ARMIJO: We believe this is Jencks.
25 And, as the Court has ordered us to do in other

1 things, we will review it for Brady material, and if
2 there is any Brady material, it will be disclosed to
3 her. But we'll do another review of it, Your Honor.

4 THE COURT: All right. Does that satisfy
5 that?

6 MS. JOHNSON: Yes, Your Honor. May we have
7 that within 14 days?

8 THE COURT: We've been using that. Is that
9 okay with you, Ms. Armijo?

10 MS. ARMIJO: Yes, Your Honor.

11 THE COURT: All right. So we'll do that
12 review within 14 days.

13 MS. JOHNSON: And, Your Honor, I think the
14 last item, because the Government has disclosed a lot
15 of the items that I had originally listed in the
16 motion to compel, is the -- we were provided with a
17 copy of the Valencia County Sheriff's Department's
18 report of the investigation of the incident. But the
19 Government provided a redacted copy. And we simply
20 are asking for --

21 THE COURT: Do you have it?

22 MS. JOHNSON: I don't, Your Honor. But I
23 can get it.

24 THE COURT: Why don't you want grab it, and
25 let me see how redacted it is. Because I've not been

1 requiring just wholesale redactions. But let's see
2 how much it's redacted.

3 MS. JOHNSON: Your Honor, counsel for the
4 Government doesn't have it readily available.
5 They've asked if I could put some of the stuff on the
6 visualizer.

7 THE COURT: Okay.

8 MS. JOHNSON: So it's not heavily redacted.
9 But I'm going to show you some of the portions that
10 are. So it begins on Bates No. 5726 U.S. versus
11 DeLeon. So, for example, in order for us to do our
12 due diligence and investigate the case, the
13 Government has redacted addresses, dates of birth,
14 Social Security numbers. I don't like to rely on the
15 Government. I like to do my own investigation of the
16 evidence that is provided, Your Honor. And this is
17 fundamental. This is key.

18 Tracking down some of these folks --
19 obviously, we know Mr. Rivera is in custody.
20 Ms. Brandy Rodriguez is here. But, for example,
21 Mr. Gomez. Mr. Gomez, his date of birth, his Social
22 Security number. I suspect that he has a very
23 extensive criminal history. And we have a right to
24 do our own investigation.

25 Also, on page 5750, the attachments, we

1 don't -- some of these are redacted. We don't know
2 why they're redacted, whether or not these were
3 provided. And this is just -- the content -- looks
4 like it's a table of contents for the supplementary
5 report by the detective.

6 THE COURT: You think they're what?

7 MS. JOHNSON: This is the table of contents
8 to the supplementary report by the detective.
9 They're redacted here, so some of the content has
10 been redacted. So I don't know what was removed,
11 why? I think it's important for the defense to
12 know -- to have it an unredacted. If they're
13 concerned about my client having an unredacted, we
14 can agree to have an unredacted copy just for
15 attorney and the investigators in the case. Because
16 the key here is making sure that I do my due
17 diligence and investigate these allegations fully.

18 For example, here, Your Honor, something as
19 simple as -- this is page 5751 -- that deputies were
20 then dispatched to -- I think we have a right to know
21 where they were dispatched to, so that we could go
22 investigate the scene, talk to any potential
23 witnesses there, what they observed, what they heard.

24 So, again, this is just an example of here
25 on page 5752, the address, presumably, of where this

1 allegedly took place, again was redacted. So some
2 information that would assist the defense in doing
3 their due diligence and investigating these
4 allegations has been redacted, Your Honor. So we're
5 asking that the Court order the Government to
6 disclose an unredacted copy of the supplementary
7 report.

8 THE COURT: What would you think about
9 disclosing an unredacted one just for attorneys' eyes
10 only, so that if Ms. Johnson wants to try to make
11 sure she's got the right people in her investigation
12 she could have it? Would you have any problem with
13 that?

14 MS. ARMIJO: Well, the problem is, then
15 every single one of these persons is going to make
16 that request. And while it may be easy for one
17 defendant with a certain amount of discovery -- and
18 may I see that discovery? It does contain much of
19 what has been disclosed is. I mean, look at this
20 one, for example. I mean, clearly, address, date of
21 birth, Social Security number. And the address is
22 obviously for purposes of safety issues, but also
23 personal information, and all of that. And so, if
24 there is something specific -- I mean, she obviously
25 knows the address of where this occurred. And if

1 there are certain addresses that she wants, we can
2 work with her. But I don't think we should get into
3 the business of agreeing to wholesale unredacted
4 copies. And I'm referring to Bates stamp 5754.
5 Again, it has information, because it's probably
6 their dates of birth. And so here's another one. It
7 says, "date of birth." Everything else is on there.
8 And so I can provide the copy. It appears to be
9 address, date of birth, Social Security numbers, and
10 addresses only that were redacted from this. If
11 there is specific addresses that she wants, I don't
12 mind that separately. But I don't think we should go
13 down the road of just redisclosing thousands and
14 thousands of pages, especially if they can get into
15 the wrong hands accidentally.

16 THE COURT: Well, I'm not going to make any
17 blanket order on this, but this particular one, given
18 that it's a particular discrete incident, I'll order
19 the Government to produce an unredacted copy of that.
20 That will be for attorneys' eyes only.

21 MS. JOHNSON: And my investigator, Your
22 Honor?

23 THE COURT: Your investigator, but caution
24 your investigator not to share it with anyone, so
25 that you can make sure that you can link up people

1 accurately on there.

2 MS. JOHNSON: Thank you, Your Honor.

3 MS. ARMIJO: And for the record, given that
4 she has specific -- can we get the Bates stamp
5 numbers of which ones she wants?

6 MS. JOHNSON: It is the entire
7 supplementary report, Your Honor that was prepared by
8 the Valencia County Sheriff's Department. And that
9 specifically begins at page -- if I may just have a
10 moment -- well, this whole section, Your Honor, just
11 begins at 5726, and it goes through 5798. It's for
12 this incident. And those are all the requests that I
13 have, Your Honor, at this time.

14 THE COURT: All right. Thank you, Ms.
15 Johnson.

16 All right. Give me a second here to get my
17 documents organized.

18 All right. Mr. Chambers? Mr. Orquiz? Mr.
19 Benjamin?

20 MR. BENJAMIN: Your Honor, if I may.

21 THE COURT: Mr. Benjamin.

22 MR. BENJAMIN: We joined that motion, and
23 we just would request, for purposes on the record,
24 that we be included in the disclosure for the report
25 and the other items that were requested.

1 THE COURT: Remind me of the circumstances
2 of why you would need that unredacted report.

3 Refresh my memory about the allegations against --

4 MR. BENJAMIN: Your Honor, I represent Joe
5 Gallegos, who is the one that -- the Government is
6 alleging that the actions were done at his behest,
7 and in order to quote/unquote tamper with that
8 witness. So all those allegations --

9 THE COURT: He's the one that ordered it,
10 right?

11 MR. BENJAMIN: Correct, Your Honor. But
12 it's the same request, essentially, to investigate
13 and be able to --

14 THE COURT: I'm going to deny that request
15 to you.

16 MR. BENJAMIN: Understood, Your Honor.

17 THE COURT: All right.

18 MS. ARELLANES: Your Honor, may I address
19 the Court?

20 THE COURT: You may.

21 MS. ARELLANES: Your Honor, we joined in
22 that motion. Although a lot of that information is
23 in the STIU files that we have, like the date of
24 birth and Social Security number, but I would like to
25 have a disclosure of that as well, as it pertains to

1 Shauna Gutierrez.

2 THE COURT: Refresh my memory as to Ms.
3 Gutierrez' involvement in that. Was she present?

4 MS. ARELLANES: She was not present at the
5 time of the assault. However, according to what the
6 Government has alleged, and what they said this
7 morning, is that Shauna told the group of three
8 people that went over to assault JG, Jose Gomez,
9 where he was staying at. And so I have received the
10 discovery. I have gone over the Valencia County
11 Sheriff's Department report. And, you know, it does
12 pertain to her.

13 THE COURT: Well, it pertains to her, but
14 again, she wasn't there. So I'm going to deny the
15 request.

16 MS. ARELLANES: Okay. Thank you, Judge.

17 THE COURT: All right. Mr. Orquiz, it's
18 your motion, or Mr. Chambers? Okay, Mr. Chambers.
19 There you are. All right.

20 MR. CHAMBERS: Good morning, Your Honor.

21 THE COURT: Mr. Chambers, how are you
22 today?

23 MR. CHAMBERS: I'm well, thank you.

24 We're going to make this really easy for
25 you, Your Honor. I've been in discussions with Mr.

1 Beck, and there were three items that we were
2 requesting.

3 The first was an internal affairs
4 investigation. Mr. Beck has advised me that they
5 have reached out to the New Mexico Department of
6 Corrections to try to get that internal affairs
7 investigation. And if they are able to obtain it,
8 they will produce it.

9 The second item had to do with STIU files
10 for some alternate suspects. And Mr. Beck has
11 advised me that those will be produced within 14
12 days. And the last item was some information that we
13 needed that was relevant to DNA testing. And Mr.
14 Beck informs me this morning that they contacted the
15 lab technician who was responsible for the DNA
16 testing, and attempted to get the information that I
17 was requesting. Apparently, the lab technician has
18 sent the documentation that was responsive to our
19 request to the United States Attorney, and the United
20 States Attorney will produce that.

21 THE COURT: These are state lab
22 technicians?

23 MR. CHAMBERS: Yes. Mr. Beck was not sure
24 if it was going to answer all the questions I had
25 about DNA, but they would give us what they had. So,

1 I guess, where that leaves us is -- and Mr. Beck
2 thought all of this could be accomplished within 14
3 days. I believe I'm accurately stating the
4 Government's position, which makes me very nervous to
5 be stating the Government's position, but if that all
6 is accomplished within 14 days, we're done. And if
7 the production that we receive is somehow deficient
8 or lacking, then I'll come back and see you.

9 THE COURT: All right. Is that all --

10 MR. BECK: That's all accurate, Your Honor.

11 THE COURT: That's correctly stated?

12 MR. BECK: Right.

13 THE COURT: Anything else you need, Mr.
14 Chambers?

15 MR. CHAMBERS: Yes, severance. No.

16 THE COURT: Severance. Okay. That keeps
17 coming back up, doesn't it?

18 All right. Ms. Harbour-Valdez, did you
19 have something on that motion?

20 MS. HARBOUR-VALDEZ: Yes, Your Honor.

21 For the record, we joined that motion on
22 the behalf of Edward Troup, and we spoke with the
23 Government this morning, and we'd just like to be
24 included in those disclosures.

25 THE COURT: All right. Are you agreeable

1 to that, Mr. Beck?

2 MR. BECK: Yes, Your Honor.

3 THE COURT: All right. So included. All
4 right. Give me a second here to -- all right.

5 Mr. Benjamin, I think this is your motion
6 on the motion to compel Government disclosure of
7 Grand Jury transcripts. If you wish to --

8 MR. SINDEL: He stepped out for a moment.

9 THE COURT: Well, then he just loses,
10 right?

11 MR. SINDEL: He wanted to --

12 THE COURT: Do you want to wait, or do you
13 want to take it up?

14 MR. SINDEL: I'd prefer to wait.

15 THE COURT: All right. So we're now
16 getting into the motions that were put on last night.
17 Ms. Wild has sent out the notice so that these are
18 noticed up now. So why don't we take up the first
19 one, which is 893. So this is Mr. Alonso's motion to
20 sever Count 3, and to sever the trials of Mr. Troup
21 and Mr. Alonso.

22 So, Mr. Chambers, if you want to argue
23 those motions.

24 MR. CHAMBERS: Yes, Your Honor. Thank you.

25 THE COURT: Because these are coming in

1 kind of late for me, I did the best I could last
2 night, this morning, trying to read these new ones
3 that are being placed on. But you may have to
4 educate me more than normal, because I'm a little
5 less prepared for these because we're doing them so
6 quickly.

7 MR. CHAMBERS: Well, I'm happy to do that.

8 And, Your Honor, first of all, I want to
9 address why this motion was not originally -- we did
10 not request it originally to be heard this week. And
11 it wasn't because we were trying to avoid it or
12 trying to put it off. But as we looked at the
13 calendar, and we looked at the motions that still
14 needed to be litigated, and based upon the time that
15 was invested on the motions for disclosure of the
16 confidential informants in February, it was our view
17 that litigating the CI motions was probably going to
18 take almost three days. And we thought it more
19 important to do those CI motions than the severance
20 motions. It was just a judgment that we made. It
21 wasn't that we were trying to avoid it. But when the
22 CI motions went away so quickly yesterday, we
23 discovered we had some time. So we asked this to be
24 moved on.

25 And I know that that was Mr. Burke's

1 position also with regard to his motions for
2 severance. It wasn't that Mr. Troup was trying to
3 avoid litigating the severance motions, it was just
4 that we thought time would be taken up with the CI
5 motions.

6 Your Honor, I heard you yesterday. And I
7 try to pay attention when you talk and when you
8 write. And, you know, the severance motion has
9 largely been decided, it appears. And I understand
10 that you even said that some dead horses deserve to
11 be beat. And this is one that does, but I'm not
12 going to do it. I think that the severance issue is
13 going to continue to come up. But I'm not going to
14 waste your time today arguing things that you've
15 already read and thought about and ruled on. But
16 there is a portion of the severance motion that has
17 not been specifically addressed, and I would like to
18 talk about it just briefly. And it may be that the
19 argument I'm going to make is something that you
20 intend to address at a later time. It has to do with
21 Bruton. I heard Your Honor yesterday say that, in
22 your experience, that most Bruton issues can be cured
23 with some scissors and Wite-Out.

24 THE COURT: Well, let me say it a little
25 bit differently. I have had success -- I can't speak

1 for the entire body of law whether every Bruton
2 problem can be solved that way. But you just work
3 hard at it.

4 MR. CHAMBERS: Right.

5 THE COURT: And generally, my experience
6 has been that I've been able to solve the problem.
7 If you can't solve it, the evidence doesn't come in.
8 I mean, it's real clear.

9 MR. CHAMBERS: Yeah.

10 THE COURT: That's the reason I warned the
11 Government that, you know, they've got to start
12 staring at this stuff. This is pretty serious. My
13 experience has been, though, that we usually can
14 massage the thing. But I can't speak for the body of
15 Bruton issues out there.

16 MR. CHAMBERS: Well, my experience is
17 similar to Your Honor's. I think that -- I don't
18 want to put a percentage on it, but many Bruton
19 issues can be resolved with proper redactions. And
20 the Government even acknowledges as much in their
21 response. It's a little more dicey in this case than
22 in some other cases. Frequently, the Bruton issue
23 involves, perhaps, a written statement of a
24 co-defendant, which can be edited, consistent with
25 Richardson versus Martin, and Gray, as long as you

1 follow the rules, it can be edited properly. It's a
2 little trickier, though, when you're dealing here
3 with informants, confidential informants, who will
4 probably just be testifying as to what someone told
5 them. They are -- you are -- they're relying on the
6 informant to make the necessary redaction. And
7 that's scary.

8 THE COURT: Well, we have to be extremely
9 careful, yeah. Yeah, I mean, that's --

10 MR. CHAMBERS: But, you know, the fact that
11 these Bruton issues arise --

12 THE COURT: I guess what I tend to do in
13 those situations is, you just have to have the
14 prosecutor lead the witness. And everybody has got
15 to just live with that; say, Is this what was said?
16 You know, to get it out. And they have to get with
17 their witness and say: There is going to be a
18 segment here where the answers are yes, no. Do
19 not -- don't free-wheel here.

20 MR. CHAMBERS: Right. Well, the fact that
21 these Bruton issues arise in the context of
22 statements made to Government informants leads me,
23 then, to another part of the discussion. And that is
24 the Government takes the position the statements made
25 to Government informants are beyond the reach of

1 Bruton. And they take the position that Bruton only
2 applies to statements made to law enforcement
3 officers.

4 THE COURT: I'm not sure I see that
5 distinction. So maybe I can be educated on it, but I
6 have not thought Bruton drew that distinction.
7 That's a Crawford-type issue. That's not really a
8 Bruton-type issue. So I'm not sure I draw that
9 distinction.

10 MR. CHAMBERS: Well, you're very wise then.

11 You're right, Bruton doesn't draw that
12 distinction. Bruton makes no distinction whatsoever
13 between statements to law enforcement officers or to
14 civilians, and it also makes no distinction between
15 statements made --

16 THE COURT: Maybe what they're getting
17 into -- and I thought about this earlier -- is there
18 may be a hearsay problem with, you know, the
19 statements in the first place. But that's an initial
20 problem, rather than a Bruton problem. You've always
21 got a hearsay problem when you've got a Bruton
22 problem. But those are two different issues.

23 MR. CHAMBERS: I agree.

24 THE COURT: So maybe what they're
25 anticipating and they're arguing the Bruton context,

1 is they're arguing as to why it overcomes the hearsay
2 statement. And I hadn't thought one through. But
3 that may be what they're anticipating, that it
4 doesn't have a Crawford issue.

5 MR. CHAMBERS: Well, you know, the whole
6 issue of the continued --

7 THE COURT: I mean, I guess that's one of
8 the things we're going to have to determine is
9 whether these cooperators, these statements that the
10 cooperators are picking up, are those Crawford
11 problems, hearsay problems? Those are two different
12 issues.

13 MR. CHAMBERS: Yes.

14 THE COURT: But, you know, are these
15 cooperators so enmeshed in law enforcement's work
16 that they were gathering statements that could be
17 anticipated as being brought to trial and to the
18 attention of the Court.

19 MR. CHAMBERS: Well, Your Honor is
20 absolutely correct that Crawford created, in some
21 people's minds, issues as to the continued vitality
22 of Bruton. And I have -- I wrote a response about
23 that, and discussed at length the history of Bruton
24 and the history of Crawford, and the history of
25 confrontation going back to the first century. But,

1 you know, Crawford -- the Government takes the view
2 that Crawford essentially gutted Bruton. And that
3 the only thing that Bruton is concerned with are
4 formal statements to law enforcement. And that's
5 based upon the reading of Crawford.

6 But there are a couple of important things
7 to note about Crawford and Bruton. First of all,
8 Crawford was certainly a Sixth Amendment
9 confrontation clause case. But that's not all it
10 was. Crawford does not rest solely on the
11 confrontation clause. It also has due process. And
12 the Bruton court specifically relied on Jackson v.
13 Denno. And Jackson v. Denno was a due process case.

14 So the constitutional underpinnings of
15 Bruton are not solely the confrontation clause, or is
16 not solely the confrontation clause. It's also due
17 process. So, to the extent that Crawford -- which is
18 a confrontation clause -- impacted the foundations of
19 Bruton, it didn't touch the due process foundations
20 of Bruton.

21 Furthermore, Your Honor, Your Honor
22 accurately observed that Bruton doesn't draw a
23 distinction between statements to law enforcement or
24 civilians, or statements made during formal
25 interviews or during casual conversations. It simply

1 doesn't draw that distinction. And what's important
2 is to remember the history of Bruton -- Bruton was
3 decided two years after Rule 14 was amended. And
4 I've quoted the advisory committee notes to Rule 14,
5 which also draws no distinction between statements to
6 law enforcement and statements to anybody else.
7 There is no distinctions drawn in Rule 14.

8 I will tell Your Honor I was troubled by
9 one aspect of the Government's response. And that
10 was on page 11, where they say -- and I quote,
11 "However, if a co-defendant's statements are made
12 unwittingly to a Government informant, those
13 statements are considered nontestimonial, and are
14 accordingly beyond the scope of Bruton." And then
15 they cite United States v. Smalls, and they say,
16 "Quoting Davis versus Washington."

17 Your Honor, that -- I want to be as
18 charitable as I can here, but that's simply not the
19 truth. Davis versus Washington says no such thing.
20 Davis versus Washington -- the only cite to Davis
21 versus Washington is in Justice Thomas' dissent. It
22 doesn't say what the Government says it is citing it
23 for. And maybe it was just an error. But that's not
24 an accurate -- that is not an accurate statement of
25 the law. And it made me mad. I've calmed down now,

1 though. I got it off my chest so I feel better.

2 And the other thing about -- you know,
3 Davis versus Washington specifically cites cases that
4 deal with statements to non-law enforcement. And,
5 indeed, the United States Supreme Court, as recently
6 as last year, in a case called Ohio versus --
7 somebody -- it's in my papers. It's Ohio v. Clark.
8 The Court there specifically said that "at least some
9 statements made to individuals who are not law
10 enforcement could come within the confrontation
11 clause."

12 So here's the problem with my argument,
13 Your Honor, and it's one that maybe you can fix soon.
14 It's the Tenth Circuit. You know, this opinion of
15 theirs in Smalls, it supports the Government's
16 argument. But I have argued why I think Smalls is
17 wrongly decided. But, of course, I understand that
18 you're obliged to follow it, even if it's wrong.
19 But Smalls leaves undisturbed Rule 14 and the Court's
20 discretion under Rule 14 to take appropriate remedial
21 steps.

22 And I think it's -- when you consider the
23 Government's argument, and indeed the Tenth Circuit's
24 interpretation of Bruton and Crawford, the results of
25 adopting that particular interpretation are stunning.

1 If you -- if Smalls is the law, and if the Tenth
2 Circuit's reading of Crawford and Bruton is correct,
3 then it is possible for a defendant to be convicted
4 entirely through uncontroverted hearsay. It's possible
5 under the Government's argument. I'll give you an
6 example, Your Honor. Imagine this: Imagine that
7 three people get arrested for murder --

8 THE COURT: Well, before you run it through
9 the Crawford, though, and even an expanded Crawford
10 and Bruton, you still have to go through, first, the
11 hurdle of the hearsay, right? I mean, if it's
12 blocked by the hearsay rules, it's not coming in.

13 MR. CHAMBERS: That's correct.

14 THE COURT: You've got to run it through
15 that first. So when you say that they would be
16 convicted entirely on hearsay, well, that's not
17 possible, right?

18 MR. CHAMBERS: Oh, it is under Smalls.

19 THE COURT: Well, but it's dealing with the
20 Crawford problem, not the hearsay problem, right?

21 MR. CHAMBERS: Smalls said that a statement
22 made by a co-defendant to an informant is admissible
23 against a co-defendant because it's nontestimonial.
24 And imagine what that means, Your Honor. Just --

25 THE COURT: But it has to satisfy some

1 hearsay exception or be nonhearsay before we even get
2 to the constitutional issue.

3 MR. CHAMBERS: Well, the hearsay exception
4 that would be relied upon is statement against penal
5 interests, which would apply to the declarant, but
6 not the co-defendant.

7 THE COURT: Right.

8 MR. CHAMBERS: But Smalls doesn't say that.
9 Smalls says it's coming in against everybody. And
10 that's frightening. Because you could be -- a
11 defendant could be convicted based entirely on
12 uncontroverted hearsay. And here's how, Your Honor.
13 You've got three guys who get arrested for murder.
14 And they get placed in separate cells. And they all
15 talk to their cellmate. And during those
16 conversations, they implicate a fourth person. Under
17 Smalls, and under the Government's interpretation of
18 Crawford and Bruton, that fourth person could be
19 convicted based on the testimony of the three
20 cellmates, based on the testimony of people who know
21 nothing at all about the case except what a
22 co-defendant told them. That fourth person could be
23 convicted without any ability to cross-examine a
24 witness who has personal knowledge of the defendant's
25 own conduct. That's what Smalls says. And that is

1 scary. That -- but that's what Smalls says, and
2 that's what the Government is arguing.

3 And we're going to have to rustle with
4 these Bruton issues at some point. And maybe I'm
5 jumping the gun here.

6 THE COURT: Well, do you think that the
7 briefing that is supplied is robust enough for me to
8 make those rulings at this point? Or is it just -- I
9 mean, my impression was that it was more general, and
10 that everybody was flagging this as a reason why I
11 should sever. But it wasn't robust in the sense,
12 like I would see with a motion in limine, where I
13 really have got to sit down and decide whether
14 evidence is coming in or not.

15 What's your thoughts about the state of the
16 record?

17 MR. CHAMBERS: Well, I have attached as
18 exhibits to the original motion, which was 893, the
19 reports that deal with the statements that I believe
20 implicate Bruton. And I don't presume to tell Your
21 Honor what sort of evidence you feel comfortable
22 ruling on. If Your Honor believes that you need to
23 actually hear from the informants to testify what the
24 declarant said, then I suppose we can do that.

25 THE COURT: No, I don't think that's

1 probably necessary, that it has to be that. But I do
2 have to exactly know -- I've got to know what the
3 statements are precisely. There can't be any fudging
4 on it. Because, like I said, if we're cutting and
5 pasting and redacting and leading, it's got to be
6 pinpoint. And then I've got to know what the
7 Government is relying on with the two-step process,
8 and maybe even three-step here, to get the evidence
9 in. So I'm not sure I need the witness, as long as
10 there is precision about the statement that's coming
11 in. Does that make sense?

12 MR. CHAMBERS: Yes, absolutely. And I have
13 provided --

14 THE COURT: I think I got that.

15 MR. CHAMBERS: If you rule in my favor, you
16 got what you need.

17 THE COURT: You're wanting a severance
18 here. I thought we were talking about motions in
19 limine.

20 MR. CHAMBERS: No. I told you everything I
21 know about it.

22 THE COURT: Help me out with the
23 Government's response. You think it's robust enough
24 for me to make the hearsay Crawford and the Bruton
25 issue?

1 MR. CHAMBERS: I think it's robustly wrong.
2 But I think that their position is not unclear.

3 THE COURT: But you think it's full?

4 MR. CHAMBERS: Yes.

5 THE COURT: All right. What else,
6 Mr. Chambers?

7 MR. CHAMBERS: That's it. Thank you.

8 THE COURT: All right. Thank you,
9 Mr. Chambers.

10 I know this is Mr. Chambers' motion to
11 sever. Any other defendant have anything they want
12 to say on this issue?

13 All right, Mr. Castle. You like talking
14 about Bruton and Crawford? It juices you up?

15 MR. CASTLE: Just a couple of comments.

16 THE COURT: Mr. Castle.

17 MR. CASTLE: When Mr. Chambers was talking,
18 he talked about the concept that there was perhaps a
19 due process layer to the analysis the Court needs to
20 undertake. And if we read Bruton, and we read Lee
21 versus Illinois, and Lilly, at the basis of all of
22 those decisions -- even though they're in
23 confrontation clause terms -- they're really talking
24 about the reliability and the fairness involved in
25 the introduction of certain categories of statements.

1 And in Lee and in Lilly, and prior to Crawford, these
2 statements were historically considered unreliable;
3 that is, statements by informants in jailhouses.

4 Now, when the Smalls decision was
5 undertaken, it was in 2000, I believe. Since 2000,
6 the United States Supreme Court has actually veered
7 in its decision, and suggested perhaps there is a due
8 process concept here that we need to look at. I
9 would point to the Melendez-Diaz versus Massachusetts
10 case, in 2009, 129 Supreme Court 2527. And in that
11 decision the Supreme Court stated that the Sixth
12 Amendment contemplates two classes of witnesses:
13 Those against the defendant and those in favor. The
14 prosecution must produce the former. The defendant
15 may call the latter. There is not a third category
16 of witnesses helpful to the prosecution, but somehow
17 immune from confrontation. So the Supreme Court is
18 saying that what the prosecution's position that
19 there is a category of witnesses against the
20 defendant that do not need to be confronted,
21 Melendez-Diaz rejected that.

22 It's interesting that they also quoted --
23 we're talking about Thomas' -- it's actually
24 concurrence in part and dissent in part in the Davis
25 decision -- but his concurrence specifically stated

1 that "the confrontation clause also reaches and
2 prohibits prosecutorial use of technically informal
3 statements when used by the prosecution to evade the
4 confrontation clause."

5 Now, what I'm suggesting -- and obviously,
6 I'm not arguing Mr. Chambers' motion -- but I think
7 since -- what's on the table here, essentially, is
8 some ideas about whether -- how the Court should deal
9 with what were traditionally considered Bruton
10 statements, is that the Court would need to
11 undertake, not just a hearsay analysis and a strict
12 confrontation clause analysis, but also a due process
13 analysis. And there is analogous situations where
14 the Court does that: Voluntariness of statements,
15 identifications made at a crime scene, the
16 admissibility of expert testimony in areas that have
17 not been -- that are novel. In all these instances,
18 the Court undertakes its due process role to make
19 sure that unreliable evidence doesn't come before the
20 jury.

21 And so all I'm suggesting here is that the
22 Supreme Court seems to be moving this direction, away
23 from the Smalls' strict analysis that was probably,
24 because it was close in time after Crawford, and
25 that -- and I don't think Smalls -- I haven't read it

1 in a while -- says that there isn't a due process
2 layer that needs be reviewed.

3 And so I think the suggestion might have
4 been by Mr. Chambers that the Court might need to
5 take a look at these statements is a good one,
6 because perhaps within the statements the Court can
7 see its reliability.

8 Now, I understand that sounds a lot like
9 Ohio versus Roberts, the old standard. But there
10 seems to be retraction or a movement back away from
11 the simple concept: Is it testimonial or not? And I
12 can't read Melendez-Diaz in any other way than when
13 they say that the confrontation right applies to
14 statements against a defendant.

15 THE COURT: All right. Thank you, Mr.
16 Castle.

17 MR. CASTLE: Did the Court need a pin cite
18 on that?

19 THE COURT: Yeah, go ahead and give it.

20 MR. CASTLE: I have the Supreme Court
21 Reporter, 129 Supreme Court, at page 2534.

22 THE COURT: Thank you, Mr. Castle.

23 Anyone else want to speak on the motion to
24 sever? Ms. Johnson?

25 MS. JOHNSON: No, Your Honor.

1 THE COURT: All right. You were just
2 getting up.

3 All right. Who is tackling these from the
4 Government's side? Mr. Castellano?

5 MR. CASTELLANO: Yes, sir. Your Honor,
6 Mr. Chambers is upset that we're relying on the
7 Smalls case. But the Smalls case is the law of the
8 circuit, and he acknowledges as much in his reply to
9 our response. So the real question is whether or not
10 the Court is willing to overturn Tenth Circuit
11 precedent --

12 THE COURT: I'm not.

13 MR. CASTELLANO: -- by not following
14 Smalls.

15 THE COURT: I'm not. I'll faithfully
16 follow Tenth Circuit precedent. I would like to
17 know, though -- I haven't thought this through -- do
18 you see anything that -- in the Supreme Court law
19 since Smalls, because it's getting a little bit down
20 the pike -- that would call into question what the
21 Tenth Circuit did in Smalls?

22 MR. CASTELLANO: I haven't, Your Honor.
23 I'll do another look, in case we need do supplemental
24 briefing, but --

25 THE COURT: Because when the Tenth Circuit

1 first came out with their interpretation of Crawford,
2 they didn't quite nail it, and they had to backtrack
3 from that with subsequent Tenth Circuit opinions, is
4 my impression.

5 MR. CASTELLANO: Right. Smalls is a 2010
6 case, so it's not very recent, but it's not at all
7 old. And what it says is -- well, let's focus on the
8 statements at issue here for starters.

9 Okay. So this is page 11 of our response.
10 And it states that Troup, "Defendant Troup confessed
11 to being" -- when I say confessed, it's not to law
12 enforcement, it's to another inmate -- "Troup
13 confessed to being a part of two murders in which two
14 people were strangled to death at the Southern New
15 Mexico Correctional Facility at Las Cruces, New
16 Mexico. Troup stated that during one of the murders
17 he held FS's legs while the defendant" -- that's
18 Mr. Alonso -- "strangled him to death with a
19 drawstring from a laundry bag."

20 The next is, "Troup bragged about being a
21 part of the murder of FS as well, and told the
22 confidential informant that defendant, also from
23 Roswell, was ordered to kill FS."

24 The other statement was, "In 2007, Edward
25 Troup admitted to the CHS that he and defendant had

1 killed FS."

2 So you can see why it's of concern to
3 Mr. Alonso. Because when you make statements to
4 someone in prison like this, it's nontestimonial,
5 meaning you don't expect this statement to show up in
6 court some day, like you would a confession to law
7 enforcement.

8 THE COURT: Help me out a little bit with
9 the people he's talking to. These are not people
10 that are mic'd up, wired, being paid, anything like
11 that?

12 MR. CASTELLANO: That's correct. At the
13 time, they were not cooperating with anybody. It was
14 talk amongst gang members. So at that time they had
15 no incentives, they were not being paid, nothing of
16 the sort. So, once again, there was no expectation
17 that these admissions would come in to court someday.
18 So, once they're nontestimonial, they're outside of
19 Crawford. So we're not talking about Crawford.
20 We're not even talking about Bruton.

21 Now, we argue --

22 THE COURT: That's the leap I'm struggling
23 with. Tell me why we're not talking about Bruton.

24 MR. CASTELLANO: Because Bruton refers to
25 "the right to the confrontation where accomplice's

1 confession was made to an government agent, and
2 introduced at a joint trial." So that is a
3 testimonial.

4 THE COURT: That's certainly the factual
5 situation of Bruton, but can you limit the language
6 of Bruton to that?

7 MR. CASTELLANO: Not to our facts. Because
8 this is a statement against interests that falls
9 under Rule 804. It's an exception to hearsay.
10 Statements against interests are inherently reliable
11 traditionally because those are statements you don't
12 make unless they're believed to be true. Well, they
13 fall outside of hearsay. They fall outside of
14 Bruton, because once again, we're not talking about
15 testimonial statements here. We're talking about
16 nontestimonial.

17 THE COURT: Maybe I'm losing something.
18 But do we even get into it being a statement against
19 interests if it's a statement of the defendant?

20 MR. CASTELLANO: Well, Smalls --

21 THE COURT: So the hearsay statement is
22 easily satisfied if you have the witness who heard it
23 of the defendant on the stand, right?

24 MR. CASTELLANO: Right. The witness who --

25 THE COURT: But that doesn't get us -- that

1 doesn't solve the Bruton problem, right?

2 MR. CASTELLANO: I don't think we're in
3 Bruton, Your Honor. Because those are testimonial
4 statements, traditionally testimonial statements,
5 because they're given to law enforcement. And once
6 we give statements to law enforcement, we expect them
7 to show up in court against you. So it's testimonial
8 in that way.

9 Under these circumstances, Smalls tells us
10 that if I murder somebody with Ms. Armijo, and I tell
11 Mr. Beck about it, the statement comes in against
12 both myself and Ms. Armijo. That's what Smalls tells
13 us. That is the law of the circuit as it stands now.

14 And as I stated earlier, in his response,
15 Mr. Chambers --

16 THE COURT: Well, you may be right. I'm
17 struggling with squaring that with Bruton, though.
18 But you may be right as far as Smalls.

19 MR. CASTELLANO: In his reply, he says he
20 understands that Smalls operates as binding precedent
21 upon the Court. So what he's asking the Court is to
22 operate around Smalls and around Tenth Circuit
23 precedent. We're merely asking the Court to follow
24 that precedent.

25 And in the Smalls case, what happened was,

1 it was a jail setting. One -- Cook and Smalls and
2 another one --

3 THE COURT: I tell you what, I want to hear
4 this, but I've got to give Ms. Bean a break.

5 MR. CASTELLANO: Sure, Your Honor.

6 THE COURT: Why don't we take our morning
7 break, 15 minutes. Then we'll come back in. I want
8 to be educated on this.

9 (The Court stood in recess from 10:34 to
10 11:05.)

11 THE COURT: All right. Mr. Castellano.

12 Let me -- come on up, but let me make some
13 comments about this distinction -- Mr. Beck has been
14 raising about the timing. I did have a chance to
15 review -- it was the Johnson case, right, Johnson,
16 which is the unpublished opinion that I think you
17 brought to my attention. I had a chance to consider
18 it during the lunch hour. That's an unpublished
19 opinion by the Tenth Circuit. It is an appeal which
20 is trying to avoid the waiver, the appeal waiver.
21 And they're saying that they didn't get Giglio
22 material. All I think that stands for is that you
23 don't have to have everything before you plea. I
24 think that was a 2010 case.

25 I think the Supreme Court has now come out

1 with a subsequent case since then, that says the same
2 thing as far as Brady. But that's pleas. We're
3 getting ready for trial. So I think that's a
4 different situation, so it's not persuasive to me.

5 I forget the judge, but he was a very good
6 district judge that the Tenth Circuit selected to try
7 the McVeigh case, when they recused all the judges in
8 Oklahoma. And he has an opinion in the McVeigh case
9 that says the timing for Giglio and Brady should be
10 the same. I think his reasoning is persuasive. You
11 can certainly find district court cases that delay or
12 circuits that have affirmed the delay of Giglio and
13 Brady material. And, you know, depending upon --
14 probably a case this large, we're going to have some
15 stuff pop up later on, so I'll have to deal with that
16 one issue at a time.

17 So I don't think it maybe raises
18 constitutional dimensions, but do I think from a case
19 management standpoint, we're now within 60 days of
20 trial, I feel pretty comfortable putting the Brady
21 and the Giglio disclosures on the same track.

22 MR. BECK: I will say, Your Honor, that I
23 have found in the last while a plethora of those
24 district court decisions that disagree, just like
25 you're saying. I think the Tenth Circuit's

1 decision -- I was just looking over it -- in Ohiri
2 supports that as well.

3 THE COURT: What is it?

4 MR. BECK: I will say this Court has
5 said -- and it followed Your Honor's citations to
6 Johnson, and sort of the legal regarding section. I
7 will say that this Court has said a number of times:
8 There is no obligation to produce Giglio information
9 before a suppression hearing. And I would remind the
10 Court that there are still upcoming deadlines for
11 motions to suppress in all of these trials. So we
12 haven't reached the deadlines to file motions to
13 suppress, let alone to have hearings on motions to
14 suppress. And so where Your Honor has said that there
15 is no obligation to produce Giglio, impeachment
16 information, as opposed to Brady, exculpatory
17 information, before a hearing on a motion to
18 suppress, I think that supports delaying the Giglio
19 production at this point.

20 THE COURT: I'd be glad to look at these
21 opinions one at a time. But I will bet you that they
22 are circumstances in which I'm not doing what I'm
23 doing here. They are, instead, situations where
24 people are trying to do discovery for the suppression
25 hearing. And I'm making some issue there.

1 Here, I am making rulings getting ready for
2 trial. If we were just sitting here, and I had Mr.
3 Benjamin wanting evidence for a suppression hearing,
4 I might be saying, you know, No, you don't get that
5 just for a suppression hearing. But here, we're
6 getting ready for trial. So I think I've got to -- I
7 think I've got to -- I think what I'm doing is
8 consistent with what I've said in the past.

9 But if you want to present me with some
10 cases and say this is not what I've done in the past,
11 I'll be glad to look at them. So far, I've not been
12 able to see an inconsistency in what I'm doing today
13 and what I've done in the past. But I certainly
14 don't mind being educated on it.

15 All right. Mr. Castellano, if you want to
16 educate me on the Smalls case. Looking at it during
17 the break, boy, I'm having trouble squaring that with
18 Bruton.

19 MR. CASTELLANO: And I think I may be able
20 to explain that from Smalls here in a moment. I'll
21 tell you first about Smalls. So Smalls involved
22 three defendants: Cook, Smalls, and Melgar-Diaz in
23 the Dona Ana County Detention Center. There was
24 gentleman named Gantz, who became known to them as a
25 cooperator with the Government. The three, Cook,

1 Smalls, and Melgar-Diaz murdered Gantz in the jail.
2 Subsequent to that, before it was discovered, Cook
3 made admissions to an informant -- a person not known
4 to him as an informant, and I'm not sure was even
5 cooperating with the Government at the time -- until
6 the admissions were taken. So Cook made admissions
7 to the informant. The informant then informed law
8 enforcement of the situation. They eventually went
9 back with a recorder and the informant took
10 additional statements from Mr. Cook.

11 And in Smalls, what happened was the
12 statements all became admissible against Cook,
13 Smalls, and Melgar-Diaz, when Cook told the informant
14 that he had murdered Gantz with the other two
15 gentlemen. And which is a similar situation here.

16 So regarding what you were asking about,
17 part of what's in the Smalls case says the text of
18 the confrontation clause reflects its focus on the
19 testimonial hearsay. It applies to witnesses against
20 the accused. In other words, those who bear
21 testimony," citing to Webster's American Dictionary.
22 "Testimony, in turn, is typically a solemn
23 declaration or affirmation made for the purpose of
24 establishing or proving some fact. An accuser who
25 makes a formal statement to government officers bears

1 testimony in a sense that a person who makes a casual
2 remark to an acquaintance does not."

3 The other thing I want to point out to the
4 Court is there is some question about our briefing in
5 our discussion of Davis v. Washington. So I found it
6 from the opinion itself. And in there it says,
7 "Because Cook's statement is nontestimonial,
8 regardless of which the foregoing definitions we
9 apply, in Davis, the court expressed the view that
10 statements made unwittingly to a government informant
11 or statements from one prisoner to another are
12 clearly nontestimonial," citing to Davis, which is
13 what we cited in our brief. So we didn't say Davis
14 said that. The Smalls-Cook said that Davis said
15 that. So that's going back a ways.

16 THE COURT: That is Smalls that you're
17 putting up here?

18 MR. CASTELLANO: Yes, that's Smalls. And
19 because I just pulled it off the internet, I don't
20 have page cites, unfortunately, Your Honor. But that
21 is the Smalls case, and that is what's reflected in
22 our brief. So once again, we didn't say that. The
23 Smalls court said that.

24 THE COURT: Who wrote Smalls, and who was
25 the panel on Smalls?

1 MR. CASTELLANO: Let me see if I can find
2 it.

3 So while I'm finding that, the difference
4 here is that Bruton involved testimonial statements,
5 and therefore, the confrontation clause. Smalls
6 involves nontestimonial statements that fall outside
7 of the confrontation clause. And because it's a
8 statement against interests, it also falls outside of
9 hearsay. So that's one of the distinctions.

10 The panel in that case, Your Honor, were
11 Judges Kelly, Baldock, and Holmes.

12 THE COURT: And who wrote it?

13 MR. CASTELLANO: Let's see.

14 MR. CHAMBERS: Baldock.

15 THE COURT: All right.

16 MR. CASTELLANO: So we're in the same
17 situation. It's a virtually identical situation to
18 the Smalls case. Here, it's a jailhouse or prison
19 setting, with admissions made from one prisoner to
20 another prisoner, who we expect to testify in court.

21 THE COURT: And again -- I know I'm
22 repeating myself -- this is not a person that was
23 paid at the time, or anything like that? Somebody
24 came forward and said: "Here's some evidence"?

25 MR. CASTELLANO: That's correct. Only once

1 this case was initiated did the statements come
2 forward. So at that time there was -- there is no
3 motivation, and the statement was certainly given in
4 a context where it was not expected to be seen in
5 court at any time. So unless there is something else
6 following Smalls, the circuit says that these
7 statements will come in, not only against Mr. Troup,
8 but Mr. Alonso.

9 THE COURT: Okay. Anything else you want
10 to say on the motion? We kind of really bore down on
11 the Bruton issue. But anything else you want to say?

12 MR. CASTELLANO: Your Honor, I think, as
13 Mr. Chambers conceded, I think you've ruled on the
14 severance motion. So the only thing really
15 outstanding was the statements.

16 THE COURT: All right. Thank you, Mr.
17 Castellano.

18 Let me before you start -- stay right
19 there. Anybody else want to speak on this issue
20 before I let Mr. Chambers have the last word?

21 All right. Mr. Chambers.

22 MR. CHAMBERS: First of all, Your Honor, it
23 was Judge Matsch, who I'm sure would be gratified to
24 hear of your high regard for him. He was the trial
25 Judge on McVeigh.

1 THE COURT: That's right, he was, yes.

2 I don't think they selected him out of a
3 hat, do you?

4 MR. CHAMBERS: I don't think so. I think
5 the fix was in.

6 Your Honor observed after the break that
7 you were having a difficult time squaring Smalls with
8 Bruton. And you're not alone, as evidenced by Judge
9 Kelly's vigorous dissent in Smalls. I will try not
10 to just get up here and read the briefs back to you.

11 THE COURT: But, in fairness, Judge Kelly
12 has had one of the broadest views of Crawford since
13 it came down, right? He issued an opinion fairly
14 quickly after Crawford, and the Tenth Circuit hasn't
15 been able to hold up that robust view of Crawford.
16 It's been cut back some, hasn't it?

17 MR. CHAMBERS: Well, in terms of Judge
18 Kelly's view of Crawford, and whether it's expansive,
19 although I generally don't believe that being
20 informed is a prerequisite to me expressing an
21 opinion, I don't have enough -- I don't know what
22 Judge Kelly's view is on Crawford. So I don't have
23 an opinion on that.

24 The Government first argues -- just
25 categorically they state, as if it's a matter of

1 settled law, that Bruton does not apply to
2 nontestimonial statements. And that is a matter that
3 remains a matter of dispute, Your Honor. The Supreme
4 Court has certainly never ruled that. Those who
5 would use Crawford to gut Bruton seize upon this
6 language in Whorton versus Bockting, which I've cited
7 to the Court. And there was some language by the
8 Court in Whorton versus Bockting that suggests that
9 Bruton doesn't apply to nontestimonial hearsay. But
10 that is -- was not a ruling. The issue in Whorton
11 versus Bockting was a very narrow issue. It had to
12 deal with whether Crawford had retroactive
13 application under the rules of Teague versus Lane.
14 And so that's only issue in Whorton versus Bockting.

15 But people have taken this language in
16 Whorton versus Bokting and taken it completely out of
17 its context and started stating as a matter of
18 established law that Bruton doesn't apply to
19 nontestimonial hearsay. And the Supreme Court has
20 never said that. They never said it in Bruton.
21 They've never overruled Bruton. So it's a stretch.

22 Furthermore, Your Honor, the Government
23 argues today the statements against interests are
24 inherently reliable. Well, the Supreme Court
25 disagrees with them. On that, they have ruled. In

1 Crawford, the Court said, and I quote, "The text of
2 the Sixth Amendment" --

3 THE COURT: This is Scalia's opinion in
4 Crawford, right?

5 MR. CHAMBERS: Correct. "The text of the
6 Sixth Amendment does not suggest any open-ended
7 exceptions from the confrontation requirement to be
8 developed by the courts. Rather, the right to be
9 confronted with a witness against him is most
10 naturally read as a reference to the right of
11 confrontation at common law, admitting only those
12 exceptions established at the time of the founding."
13 That's Crawford page 54.

14 The Court went on to say, "Accomplice
15 confessions that inculcate a criminal defendant is
16 not within a firmly rooted exception to the hearsay
17 rule," citing Lilly versus Virginia. So if a
18 statement against penal interests is not within a
19 firmly routed exception to a hearsay rule, it
20 necessarily could not have been an exception that
21 existed at the time of the founding.

22 I'd also -- you know, when you're thinking
23 about whether a statement against penal interests is
24 inherently reliable, it might be as to the person who
25 is inculcating himself. But there is certainly no

1 reliability as -- when he inculcates other people.

2 And the United States Supreme Court has
3 made that recognition as well in a case that I cited
4 in my reply, the Williamson case, where the Court
5 said, and I quote, "In our view, the most faithful
6 reading of 804(b)(3)" -- statements against penal
7 interests -- "is that it does not allow admission of
8 non-self-inculpatory statements, even if they are
9 made within the broader narrative that is generally
10 self-inculpatory. The district court may not just
11 assume for purposes of 804(b)(3) that a statement is
12 self-inculpatory because it is part of a fuller
13 confession. And this is especially true when the
14 statement implicates someone else," end quote.

15 And, Your Honor, you know, this is a real
16 cool issue. It's fascinating. But the fact of the
17 matter is, no matter what you do with Crawford, no
18 matter what you do with Bruton, no matter what you do
19 with Smalls, no matter how you slice that
20 constitutional pie, it doesn't change one fact. Rule
21 14 still exists. Smalls, Crawford did not touch Rule
22 14. And Rule 14 gives you the discretion to --
23 here's what Rule 14 says: "If the joinder of
24 offenses or defendants in an indictment, an
25 information, or a consolidation for trial appears to

1 prejudice a defendant or the Government, the court
2 may order separate trials of the counts, sever the
3 defendants' trials, or provide any other relief that
4 justice requires."

5 You have discretion. That discretion is
6 untouched by Smalls, by Crawford, by anything else.
7 You have the discretion to make this fair. And in
8 making that -- in exercising your discretion, your
9 discretion should be informed by things such as Rule
10 403. And the unfair prejudice that comes to people
11 like Mr. Alonso, if the Government gets its wish to
12 put in Troup's statements, just without any
13 limitation. So, if you have questions, I'll fake an
14 answer.

15 THE COURT: I don't believe I do. Thank
16 you, Mr. Chambers.

17 MR. CHAMBERS: Thank you.

18 THE COURT: Well, I'm not going to grant
19 the motion to sever at this time. Obviously, I'm
20 going to have to continue to monitor this case and
21 the evidence that's coming in. And I'm going to have
22 to probably start making some rulings. So maybe I'll
23 use this motion to drill down a little bit more on
24 the Smalls and Bruton and Crawford issues to give
25 some guidance in this case. I am inclined to think

1 that, given the law that we have here in the Tenth
2 Circuit, that we don't -- this is not a -- this is
3 not a sound basis for declining, or for granting the
4 motion to sever.

5 It does concern me a little bit, letting in
6 some statements that, even though the Tenth Circuit
7 may be allowing at the present time, letting them
8 come in, and down the road they -- the landscape may
9 change on us, and decisions that I make now, based
10 upon Tenth Circuit law, may change because of the
11 Supreme Court's changing character. But we all have
12 to deal with that.

13 And so I still think the decision to keep
14 Count 3 in the case, and keep Alonso and Troup,
15 remains sound. But I'm still going to continue to
16 take hard looks at this to make sure that everybody
17 gets a fair trial.

18 Mr. Castellano.

19 MR. CASTELLANO: Your Honor, as you're
20 considering this issue, I'd also point the Court to
21 the 2014 Smalls decision. It's the decision that
22 came out post-trial, post-conviction. Related to a
23 discussion of prior consistent statements it says
24 that "Smalls also argues that for a prior consistent
25 statement to be admissible under the confrontation

1 clause, it must meet pre-Crawford standards of
2 reliability. But the confrontation clause has no
3 application to nontestimonial statements, and,
4 therefore, permits their admission, even if they lack
5 indicia of liability," citing to Whorton v. Bockting,
6 B-O-C-K-T-I-N-G, U.S. Supreme Court 2007. And also
7 the Smalls case.

8 The only question --

9 THE COURT: I don't think there is any
10 disagreement on that, right? I mean, the
11 confrontation clause has no application to
12 nontestimonial statements. I'm not trying to butt up
13 against that. But I am trying to -- I mean, as
14 Mr. Chambers put it, we are talking about Troup's
15 statements, right?

16 MR. CHAMBERS: Yeah.

17 THE COURT: So that's the problem that I'm
18 having is Troup's statements.

19 MR. CASTELLANO: That's correct, Your
20 Honor. We intend to admit Troup's statements against
21 both him and Mr. Alonso. There is no doubt that
22 that's what we want to do.

23 THE COURT: Well, I'll have to give that
24 some hard look. I mean, it may just be that Smalls
25 is as broad as what you're relying on, but it

1 concerns me some.

2 MR. CHAMBERS: Your Honor, I would just
3 add, if I could --

4 THE COURT: You may.

5 Thank you, Mr. Castellano.

6 MR. CHAMBERS: Yeah, the law is what it is.
7 Crawford says what it says that -- about whether the
8 confrontation clause applies to nontestimonial
9 hearsay. But that doesn't answer the question.

10 And as I pointed out in my --

11 THE COURT: It doesn't answer your
12 severance question?

13 MR. CHAMBERS: It also doesn't answer the
14 question about the limits of that, about the borders
15 of the confrontation clause. Because the Crawford
16 court specifically declined to define what was
17 testimonial and what was nontestimonial.

18 And furthermore --

19 THE COURT: Sure. I think Scalia
20 explicitly --

21 MR. CHAMBERS: Explicitly.

22 THE COURT: -- gave that to the lower
23 courts to develop.

24 MR. CHAMBERS: And in cases since Crawford,
25 such as Davis versus Washington, and Hammond, which

1 were companion cases, the court has provided scant --
2 they haven't helped much in defining what is
3 testimonial and what is nontestimonial.

4 THE COURT: Well, it certainly seems to me
5 that this would fall safely into the nontestimonial,
6 wouldn't it?

7 MR. CHAMBERS: No, I don't think so, Your
8 Honor.

9 THE COURT: I mean, this one doesn't seem
10 to me on the edges, as much as some other scenarios
11 I've seen.

12 MR. CHAMBERS: I believe it's testimonial.
13 And my position is derived from a reading of both
14 Davis versus Washington, and Hammond versus -- was it
15 Indiana? I can't remember. But Davis and Hammond.
16 And the distinction that the court drew in Davis and
17 Hammond was a statement is nontestimonial if it is
18 made in the context of an ongoing emergency. It is
19 testimonial if it is describing past events.

20 THE COURT: That's more where you come up
21 on the scene, and you're sorting out -- the police
22 are there, but you can still have some nontestimonial
23 statements with police around. You can't draw a
24 bright line and say, just because the cops are there,
25 it's testimonial.

1 MR. CHAMBERS: That's right. And that's
2 Davis.

3 THE COURT: But if you're in a prison cell,
4 and you've got a guy talking to another prisoner,
5 seems to me that's pretty classic nontestimonial.

6 MR. CHAMBERS: I disagree, respectfully.
7 And I wrote why in -- I don't know my reply number.

8 THE COURT: Give it to me again.

9 MR. CHAMBERS: 1038, maybe 1036.

10 THE COURT: Summarize it again for me.

11 MR. CHAMBERS: Okay. In Davis versus
12 Washington, and in Hammond -- they're both domestic
13 violence cases -- and in Davis versus Hammond (sic),
14 cops talked to the victim of a domestic violence
15 incident. In Davis, the hearsay statements were made
16 by a domestic dispute victim to a 9/11 operator in
17 the context of an "ongoing emergency," that's
18 according to Davis. The Court found that statements
19 in Davis were made during an ongoing emergency in
20 which the declarant was speaking about events as they
21 were actually happening, rather than describing past
22 events. Davis page, 827. Accordingly, the Davis
23 Court held that the statements were nontestimonial.
24 In Hammond, the statements were also made
25 by the victim of a domestic dispute. But unlike

1 Davis, not in the context of an ongoing emergency,
2 but rather, as an investigation into, quote, "what
3 happened." In Hammond, although the statements at
4 issue were made within minutes of the crime, the
5 court found that there was no ongoing emergency, and
6 the declarant was describing what happened instead of
7 what was happening. Hence, the statements were
8 testimonial.

9 Well, here, the statements that are at
10 issue here are not describing a current -- events as
11 they are happening. They are describing what
12 happened. And, therefore, under the Davis-Hammond --
13 I don't even want to call it a definition, but --

14 THE COURT: I think those are unique. I'm
15 probably not going to buy that distinction. Because,
16 otherwise, anytime you have somebody giving
17 historical facts, you're saying that that's
18 testimonial. And that seems to me -- I think you've
19 got to still have the presence of the cops. That's
20 what's making Hammond and Davis so important is that
21 you've got law enforcement, and it's almost -- it's
22 almost the excited utterance exception to the
23 Crawford Rule, that if you're in the middle of the
24 fray, and people are saying what they're saying,
25 they're not going to toss that evidence out.

1 But if you've got -- I mean, take it out of
2 the jail, take it out of our case.

3 MR. CHAMBERS: Okay.

4 THE COURT: You've got somebody that, you
5 know, is just talking on the phone to somebody else,
6 and say, "I killed that person," and they're talking
7 to their cousin, and they said they killed somebody.
8 And, you know, how would that not be nontestimonial?

9 MR. CHAMBERS: Well, the Davis court
10 actually specifically cites cases, Your Honor. And
11 I'm looking for them in my brief. One of them is an
12 ancient case. You'll probably have to dust off, wipe
13 the dust off this book if you want to read the
14 opinion. It's found at 1 Leach 199, a case, King
15 versus Brasier, 1799. But Davis cites it. The
16 United States Supreme Court relied on it. I'll leave
17 for another day my opinion about whether the United
18 States Supreme Court should be relying on
19 international authority. But they did here. And
20 there, it was not a statement to a cop. It was not.
21 And that was in 1799.

22 And in 2015, they reached the same
23 conclusion in Ohio versus Clark, where they
24 specifically said, "at least some statements to
25 individuals who are not law enforcement, but

1 conceivably raise confrontation concerns, we decline
2 to adopt a categorical rule excluding them from Sixth
3 Amendment's reach."

4 THE COURT: Well, I think that's true. I
5 mean, that's what I keep asking Mr. Castellano. Who
6 is this cooperator? Tell me about him. I mean, you
7 know, is this a person that, you know, that is being
8 paid by law enforcement? Yeah. Or something like
9 that. So I agree with that statement. You can't
10 just say, Well, it was another prisoner. Wait, tell
11 me about that prisoner.

12 So I agree, but I think to just make it a
13 functional test: Was it past history or was it
14 current events is sweeping too broadly. I think
15 you'd gut the testimony on nontestimonial
16 distinctions that have been developed since Crawford.
17 So I'm probably not going to go that direction.

18 MR. CHAMBERS: Which is why I didn't say
19 that Davis and Hammond defined testimonial, because I
20 don't think it does define it. I think it provides
21 some guidance, though. That's about the best I can
22 do.

23 THE COURT: All right. I'll take a hard
24 look at it. Thank you, Mr. Chambers.

25 All right. So I'm going to deny that

1 motion, but I may use it as a vehicle to start
2 sketching out how we're going to handle some of these
3 statements that are going to be used against multiple
4 defendants.

5 Hold on, we skipped Mr. Benjamin, so I'm
6 going to have to work here to get my stuff back in
7 order one second.

8 All right. Mr. Benjamin, do you want to
9 talk about the Grand Jury transcripts?

10 MR. BENJAMIN: Yes, Your Honor. Thank you.

11 THE COURT: Mr. Benjamin.

12 MR. BENJAMIN: I apologize, Your Honor. I
13 stepped out earlier thinking I had 30 seconds. And
14 Mr. Chambers was much shorter than I believed he
15 would have been.

16 THE COURT: That's fine.

17 MR. BENJAMIN: Your Honor, before I begin,
18 I need to make sure that, I guess, the motion is
19 clear. It should be construed as only requesting
20 transcripts for Counts 4 and 5, which are the counts
21 that relate to a 2012 alleged murder of Adrian Burns,
22 by Joe Gallegos and his brother, Andrew Gallegos. So
23 it's not a request for any and all transcripts. It's
24 a request for transcripts relating specifically to
25 Counts 4 and 5.

1 And I think the reason that those
2 transcripts are important is because, as cited in the
3 motion, Douglas Oil directed that there are three
4 factors looked at when considering release of Grand
5 Jury transcripts. The first one is avoiding a
6 possible injustice. Your Honor, this is a state murder
7 trial -- this was a state murder allegation. In its
8 elements it does not meet anything resembling a VICAR
9 murder, unless there is something to bring it under
10 the umbrella of the federal district court. And so I
11 think that's an extremely prejudicial jurisdictional
12 requirement. Because in doing so, bringing it into a
13 VICAR charge, as the Court's well aware, the
14 evidence, the arguments, and everything that will be
15 used to charge the individual and prosecute that
16 individual for that murder become vastly more broad
17 than they would have otherwise.

18 THE COURT: The evidence coming in?

19 MR. BENJAMIN: Yes, Your Honor, excessively
20 so.

21 And so the second argument is that
22 disclosure need outweighs the greater need for
23 secrecy. Grand Jury transcripts are usually secret.
24 And does Mr. Gallegos' need for the information that
25 he's being prosecuted for outweigh that? I would

1 argue, yes.

2 And lastly, and this is why I made that
3 requirement that, I guess, was inaccurately made in
4 the motion, Your Honor. It's tailored, it's a
5 tailored request, specifically for the testimony
6 relating to Counts 4 and 5.

7 Now, I think the majority of what I have is
8 based upon some documents that were produced in
9 discovery, that when they were produced and when I
10 understood that they were valid, negated this
11 argument. But now that there has been a retraction
12 of those documents -- and the first document was a
13 document Bates stamped 1580, that was produced June
14 17, 2016; it was dated December 9, 2015. That
15 document was again disclosed under a different Bates
16 stamp. It's the identical document, but it's Bates
17 stamped 4472, disclosed July 1, 2016, and dated June
18 6, 2016, essentially seven months later. But it's
19 the identical statement, Your Honor, that I cite in
20 the motion and attached as an exhibit.

21 It says that Roy Martinez talked about Joe
22 Gallegos killing Adrian Burns on a wire, which would
23 bring it, arguably, under the umbrella of federal
24 jurisdiction for a VICAR prosecution. This was done
25 for that reason, was the allegation. However, that

1 was retracted in a document Bates stamped 21822, on
2 March 9, 2017. And that document was dated,
3 though -- and I think this is important --
4 essentially, almost three weeks earlier, on February
5 14, 2017.

6 THE COURT: Now, how are you using the word
7 "retracted"?

8 MR. BENJAMIN: That document that was
9 produced states that this was a misunderstanding,
10 miscommunication or "mis" something in the notes
11 taken by Special Agent Acee, when he was interviewing
12 the cooperator that had told him that.

13 Essentially --

14 THE COURT: So you've got a 302, and it
15 says one thing, and then you get another 302, or an
16 amended 302 saying, no, that's not what was said?

17 MR. BENJAMIN: Yes, Your Honor. But the
18 reason I gave the specific dates and Bates numbers is
19 because there is a document that's produced, the same
20 document is again produced seven months later. And
21 then approximately eight months after that, but
22 produced on the same day of the second superseding
23 indictment, is the document that says: What you have
24 in your possession is inaccurate, is not correct for
25 one reason or another.

1 THE COURT: Is it getting better for you or
2 worse?

3 MR. BENJAMIN: Much better, Your Honor.
4 Because that takes away any claim of what I
5 understood any basis for a state murder being
6 prosecuted in this courthouse is.

7 And so that brings us to where we are, Your
8 Honor. There is nothing that has been produced that
9 would support the idea that this murder was committed
10 in furtherance of a VICAR or to support a VICAR
11 prosecution.

12 Now, Document 933, which is the response by
13 the United States Government to Andrew Gallegos'
14 motion to sever includes three very conclusory
15 statements. And those statements are found first on
16 page 2; that the murder was conducted because Joe
17 Gallegos was being disrespected in the community by
18 Adrian Burns. And that's page 2 of Document 933,
19 Your Honor.

20 The next statement is page 15 of document
21 933; that sufficient evidence exists to prove the
22 conspiracy to murder Adrian Burns.

23 And the third statement that's put in there
24 is that on page 19, Gallegos -- Joe Gallegos,
25 specifically -- did -- conducted the murder to

1 advance his pecuniary interest in the SNM Gang.

2 All of those, but most specifically the
3 sufficient evidence exists to prove the conspiracy
4 boggles me, because there is no evidence that I am
5 aware of to show that there is any evidence to
6 support the claim of federal jurisdiction, now that
7 the wire statement or the wire conversation, whatever
8 you may call it, was retracted.

9 And so this becomes, I think, very
10 troubling, because -- and while the determination of
11 no probable cause by a State of New Mexico
12 magistrate, in December of 2012, about this murder
13 doesn't bind this Court or anything, it's
14 illustrative of the type of evidence that exists to
15 prove that this murder, A, occurred; and, B, more
16 importantly, because of where we are, occurred, and
17 is subject to prosecution in federal court.

18 The Court stated something earlier when it
19 was talking to Ms. Johnson regarding the bill of
20 particulars that she had alleged there. And I think
21 it's fair to say that for Counts 13 through 16, I do
22 have a good feel of what the evidence is, and what
23 the evidence -- how the Government will do that. But
24 I can tell this Court that I do not have any feel of
25 what the evidence is or how the Government's theory

1 regarding Counts 4 and 5 makes this subject to
2 federal prosecution.

3 And so, Your Honor, I would argue that the
4 presentation to the Grand Jury meets Mr. Gallegos'
5 need to review what was presented to the Grand Jury,
6 avoids a possible injustice, is much greater a need
7 for disclosure than the secrecy, and it is very
8 tailored. It's tailored regarding Counts 4 and 5.

9 And even if Special Agent Acee didn't
10 testify about the statement on the wire and that
11 retraction of that statement, which, as I said, the
12 retraction was -- the 302 for that retraction was
13 done three weeks prior to the second superseding
14 indictment being received -- even assuming those
15 arguments are facts, there is nothing that takes this
16 into the realm of federal jurisdiction that I am
17 aware of that has been produced in the discovery
18 regarding Counts 4 and 5, or, even more broadly, Your
19 Honor, that has been produced.

20 And so we're asking that the Court order
21 the Government to produce the transcripts for Counts
22 4 and 5, Your Honor, from the -- and I would assume
23 it's the original superseding indictment. And if
24 there are different ones for the second superseding
25 indictment, Your Honor.

1 THE COURT: Now, you did not file a reply
2 to the Government's response, right?

3 MR. BENJAMIN: Correct, Your Honor.

4 THE COURT: And your motion was broader,
5 right? It still wanted the Grand Jury indictments,
6 and all the -- the Grand Jury transcripts on all the
7 counts against Mr. Gallegos?

8 MR. BENJAMIN: The motion doesn't limit it.
9 My intent from the beginning -- I apologize to the
10 Court and to the Government -- my intent was to limit
11 it to Counts 4 and 5.

12 THE COURT: All right. Thank you, Mr.
13 Benjamin.

14 Ms. Armijo.

15 MS. ARMIJO: Your Honor, I think that, in
16 looking at his motion, it was our belief that he was
17 indicating that the basis for his relief was that he
18 believed there was false -- erroneous, false, or
19 missing information, specifically referring to Counts
20 4 and 5. And the information about -- the
21 misinformation about, quote, "the wire." And in
22 talking to him before -- I think it was during the
23 break, or before this was being heard -- he thought
24 that Special Agent Acee testified at the Grand Jury.
25 Special Agent Acee did not testify as to this --

1 these counts in the Grand Jury. And that information
2 about the wire was not presented to the Grand Jury at
3 any point in time. The Grand Jury made their
4 determination based upon facts that were presented to
5 them entirely about the whole investigation.

6 So our position is that this is Jencks.
7 And if he is having a concern that we are not able to
8 meet our elements -- he did file a bill of
9 particulars last night. Maybe that's more
10 appropriate for that motion. But it's certainly
11 not -- the correct avenue for him to seek this
12 information is not for the release of Grand Jury
13 transcripts. So we are opposed based on that.

14 Maybe, again, this could be more
15 appropriate for the bill of particulars, but
16 certainly not at this point. Or a motion for a
17 directed verdict. I think it would be his benefit if
18 he feels this is just a state case, obviously. But
19 he doesn't deserve the Grand Jury transcripts just
20 because he feels that our case is weak, as far as
21 this being a VICAR count.

22 THE COURT: Let me make sure I understand.
23 So you did not have any live viva voce evidence on
24 these two counts?

25 MS. ARMIJO: What do you mean? As far

1 as --

2 THE COURT: You didn't have a witness?

3 MS. ARMIJO: Who testified before the Grand
4 Jury?

5 THE COURT: Right, on these two counts.

6 MS. ARMIJO: We did. It was Mark Myers.
7 We did not have a cooperator testify, no.

8 THE COURT: Okay. So all you've got on --
9 as far as live testimony at the Grand Jury was Myers?

10 MS. ARMIJO: Yes.

11 THE COURT: On these two counts?

12 MS. ARMIJO: Yes, as far as the first one.

13 And I don't believe in the second superseding
14 indictment we talked about this at all, or in the --
15 yes, this was discussed in the first superseding
16 indictment. And nothing about the wire or anything
17 else was --

18 THE COURT: Is Myers going to testify in
19 this case on these two counts?

20 MS. ARMIJO: Probably not. I say that
21 because unless -- I am thinking off the top of my
22 head, I'm saying probably not as to these two counts,
23 because this case was initially investigated by the
24 state, so there would be a lot of state witnesses.
25 And then the federal interests came in. But I don't

1 think that -- off the top of my head, I don't see him
2 as that, unless there was a witness that he
3 interviewed; then he would have to come in and talk
4 about, but --

5 THE COURT: But he's going to testify?

6 MS. ARMIJO: He's going to testify. But
7 we're talking about these two counts in particular.

8 THE COURT: And you're going to produce
9 these transcripts 14 days before trial as part of
10 your Jencks production?

11 MS. ARMIJO: Yes, Your Honor. We have said
12 that we would produce Jencks 14 days before trial.

13 THE COURT: And that's probably going to
14 sweep in a lot of the Grand Jury transcripts, right?

15 MS. ARMIJO: Yes. And that's why we're
16 doing it 14 days, as opposed to just three days or
17 one day, or before the witness takes the stand.

18 THE COURT: And, usually, there is not a
19 lot of Giglio and Brady material in Grand Jury
20 transcripts. But has anybody looked at Myers'
21 testimony for that purpose?

22 MS. ARMIJO: For the purpose of if he
23 mentioned the wire or anything? I read over it this
24 morning --

25 THE COURT: Just Brady, Giglio, Rule 16,

1 anything helpful there?

2 MS. ARMIJO: I will reread it for those
3 purposes. I reread it for the purpose of this fact.
4 This information was relied upon. And I spoke to him
5 about that. But I will reread it for that purpose.
6 It isn't very lengthy. And, certainly, if there is
7 anything that we feel is Brady, we will then disclose
8 it to Mr. Gallegos' attorneys.

9 THE COURT: What is your argument -- when
10 Mr. Benjamin talks about, and I'm not sure, maybe, I
11 fully appreciate what he's saying -- that I guess
12 this is -- I'll put it in my words, and see -- this
13 is just a state law murder rather than being a VICAR,
14 these Counts 4 and 5, there is no evidence linking
15 his client to the federal crimes here? Is there
16 something you can point out outside of the Grand Jury
17 transcripts that you're going to be relying on?

18 MS. ARMIJO: Well, I think he has the
19 general idea of it. He just thinks -- he's just
20 critical of the information. When he talks about --
21 and I don't have it in front of me -- he referred to
22 a response, Document 933, that I do not have in front
23 of me. But it's the general proposition that the SNM
24 is a criminal enterprise; it is engaged in
25 racketeering activities, which would include drug

1 activities. Mr. Gallegos was on the street at the
2 time, was involved in drug activities. And there
3 was -- the victim in this case and he, obviously,
4 were not getting along, for lack of better words, and
5 the victim was eventually killed.

6 And we do have statements from people
7 that -- and I don't have it in front of me to say
8 what was disclosed -- but we certainly have people --
9 statements that were obtained during the FBI
10 investigation, that were at the Gallegos residence
11 and with the Gallegoses after the murder that could
12 talk about it, in addition to various statements of
13 people related to the victim. And this is in
14 addition to the state investigation.

15 So the general theory, though, Your
16 Honor -- I think he understands it -- is that it's
17 Mr. Gallegos' relationship with the SNM, his position
18 with the SNM. He's obviously charged in two
19 different murders for the SNM in this case.

20 THE COURT: All right. Anything else, Ms.
21 Armijo?

22 MS. ARMIJO: No, Your Honor.

23 THE COURT: All right. Thank you, Ms.
24 Armijo.

25 Let me ask: Any co-defendants want to

1 comment on this motion in any way?

2 All right. Mr. Benjamin.

3 MR. BENJAMIN: Your Honor, I can state that
4 I don't have any idea what this is. There are three
5 statements in a response to Andrew Gallegos' motion
6 to sever, but I -- and I've asked other counsel if
7 they have seen any statements regarding a -- just
8 broadly, actions being taken because of somebody,
9 specifically Adrian Burns, disrespecting Joe Gallegos
10 in the community, and how that would tie into the
11 SNM. I am not aware of -- once again, out of the
12 Document 933, page 15 -- any evidence, as opposed to
13 sufficient evidence, to prove the conspiracy to kill
14 Adrian Burns.

15 THE COURT: But how is the Grand Jury
16 testimony going to help anyway? You now know, if you
17 didn't know already, that it's Myers. It sounds like
18 it's very brief. It doesn't sound like there is
19 anything exculpatory or helpful to you on that side,
20 which is often the case with Grand Jury testimony.
21 It's not a very fruitful area for the defendant? How
22 does it help you?

23 MR. BENJAMIN: Your Honor, because Mr.
24 Myers, Agent Myers, would have gone in, and would
25 have presumably told them: The brothers got together

1 and they killed Adrian Burns, and this is why they
2 did it. However, if that is what he explained to
3 them, there is no federal jurisdiction for Counts 4
4 and 5.

5 THE COURT: Well, but don't we just have
6 that problem, period? We don't need the Grand Jury
7 transcripts. It's a problem, right?

8 MR. BENJAMIN: It is a problem, Your Honor.
9 But there has been approximately 50,000 pages of
10 documents produced, and there are the sheriff's
11 office investigative reports that were produced in
12 this matter that -- there's cooperator statements,
13 statements that are redacted, there are a lot of
14 other things. But there is nothing in relation to
15 Counts 4 and 5.

16 And, more specifically, there is nothing
17 that comes anywhere close to what, or comes at all
18 within what the Government has put in Document 933
19 that would support that.

20 THE COURT: But I guess that's what -- how,
21 then, is the transcript of Myers' testimony going to
22 help you? You're going to get it eventually. How is
23 it going to help you now?

24 MR. BENJAMIN: Well, Your Honor, first off,
25 I think that it allows me to understand who or how

1 Joe was disrespected in the community, or considered
2 himself disrespected in the community, and the other
3 federal jurisdictional elements that had to have been
4 presented to the Grand Jury in order to return an
5 indictment. Because that has to be in there.

6 Otherwise, there wouldn't have been an indictment.
7 Essentially, my position, I think, Your Honor is, but
8 for that jurisdictional evidence, that I don't know
9 what it is, there could not have been an indictment.

10 THE COURT: All right. Anything else on
11 this, Mr. Benjamin?

12 MR. BENJAMIN: Your Honor, I would request
13 that, should the Court deny this request to produce
14 the Grand Jury testimony, if the Court would consider
15 reviewing that in chambers -- I'm sorry, not in
16 chambers -- in camera.

17 THE COURT: All right. What do you think
18 about that request, Ms. Armijo?

19 MS. ARMIJO: Well, again, I don't want to
20 go down that road. And what is the purpose of the
21 Court reviewing it? If it's just that -- I mean, the
22 entire Grand Jury presentation -- because it was done
23 up in parts -- is different segments, so the Court
24 would look at that and say, Well, I'm not sure what
25 the whole Grand Jury -- then you're looking at the

1 whole Grand Jury transcript. Again, I think that his
2 issue with not being able to -- he's filed a motion
3 for a bill of particulars, and then maybe that's
4 where we deal with this whole issue. I don't think
5 that this is the correct avenue. I will review the
6 Grand Jury transcripts for Brady as to these counts,
7 and if we feel that there is anything there that is
8 Brady, we will certainly disclose it to Mr. Benjamin.

9 THE COURT: Well, do this: Just the
10 portion of Myers' testimony that links this to
11 federal jurisdiction, send me that.

12 MS. ARMIJO: Okay. But I don't know --

13 THE COURT: If it doesn't exist, then that
14 will tell me something. But --

15 MS. ARMIJO: And I don't know that Myers
16 specifically said here is the federal link. I think
17 that the Grand Jury heard testimony from a variety of
18 witnesses, including information about the SNM and
19 how they work, so -- and took everything in totality.
20 So I don't know.

21 THE COURT: Well, let me assume, then, that
22 Myers didn't say anything about it. The Grand Jury
23 was just supposed to draw an inference that, when the
24 defendant -- that I guess anytime the defendant did
25 something, that that was in furtherance of the SNM

1 Gang's interests; would that be fair? That's the
2 case before the Grand Jury?

3 MS. ARMIJO: And could you repeat it again,
4 Your Honor?

5 THE COURT: Well, that Myers did not offer
6 any specific testimony as to what Gallegos did or did
7 not do on behalf of the SNM. It didn't link this
8 crime up with the SNM. It was just that there was a
9 lot of testimony about: Here's how the SNM Gang
10 operates. And then we got around to, then, linking,
11 with Myers' testimony, Gallegos to the crime? Is
12 that fair? Is that a good picture?

13 MS. ARMIJO: That's fair. And I can
14 certainly reread it to see if there were. But I know
15 I was present for the Grand Jury, and I don't believe
16 I said to Myers: And what is the federal link to
17 this? But it was a rather lengthy presentation with
18 what the SNM is, and --

19 THE COURT: But you also -- I know that he
20 probably isn't talking about federal jurisdiction
21 before the Grand Jury. But is there testimony by
22 Myers in which you ask him, and he says, Hey, this
23 is -- here's the reason we did this crime, or here's
24 the reason we committed what would otherwise be a
25 state act, and we did it because of the SNM Gang? Or

1 was the Grand Jury just supposed to infer that from
2 the prior testimony about how gangs operate; this
3 must have been a gang crime?

4 MS. ARMIJO: I can reread it and let the
5 Court know.

6 THE COURT: But you think it's the way I'm
7 describing it?

8 MS. ARMIJO: I think it is. But I think
9 that there was obviously more. But I'd have to sit
10 down and read it again. It's not that long, Your
11 Honor. What I can say is that we do have a
12 cooperator who will say that Adrian Burns
13 disrespected Joe Gallegos; that Andrew Gallegos stole
14 drugs from Adrian Burns; that Burns was their
15 supplier, and took the theft to the public, which
16 then shamed the Gallegos brothers. And shaming an
17 SNM member is not a good thing to do as far as their
18 reputation.

19 And so we do have specific cooperators that
20 will talk specifically about it. It's not just a
21 generalized, Oh, this is a drug case; oh, this is
22 that. We have specific cooperators that will talk
23 specifically about this.

24 THE COURT: But as far as the Grand Jury
25 testimony, that's not something that was presented to

1 the Grand Jury? You've got additional evidence?

2 MS. ARMIJO: I think that was something
3 that came out after -- this cooperator we spoke to
4 after. So I know -- I'm pretty certain that this
5 specific information was not in the Grand Jury
6 transcript. But I will review the Grand Jury
7 transcript to see what else is there, as far as the
8 Court's questions about that. But, again, I think
9 that that's probably more for the bill of
10 particulars.

11 THE COURT: So I'm going to assume, for
12 purposes of this motion, that the picture I'm getting
13 is the Grand Jury was given some robust -- sort of
14 like the indictment itself -- some robust description
15 of how the gang operates, which we know what the
16 indictment says. And then there was -- given that
17 there doesn't seem to be anything specific, it's just
18 information as to Myers saying, Well, they committed
19 this crime, and so the jury inferred that it was a
20 gang-related crime, rather than some personal dispute
21 between the two. If that's the case, I think you and I
22 can assume -- and for purposes -- given without the
23 transcript -- that there is nothing there that's
24 going to give you any more information than what the
25 documents are going to give you.

1 MR. BENJAMIN: Except, Your Honor, if that
2 information is not there, it is Exhibit A to my
3 motion to dismiss.

4 THE COURT: Well, I think you and I can
5 assume that. We have to assume that it's not there.
6 So you can file your motion and say, "It's not
7 there."

8 MR. BENJAMIN: But, Your Honor, that would
9 then lead to my basis for the claim, which is false
10 and misleading information. Because there has to be
11 evidence on every element of -- and I apologize, Your
12 Honor, but I guess I'm not understanding. I can't
13 assume that in a motion to dismiss, I don't think.

14 THE COURT: Well, I think that's what the
15 Government is telling us.

16 MR. BENJAMIN: Okay.

17 THE COURT: So I think you can assume it.
18 If, all of a sudden, they produce a Grand Jury
19 transcript that does have Myers saying to the jury
20 that this is the reason it's not just a state law
21 crime, it's a federal crime, is because he was doing
22 this on behalf of the SNM, you've got a little
23 more. But you still don't have what I think you're
24 looking for, is that robust sort of evidence of the
25 United States going to the Grand Jury and saying, By

1 the way, these guys were in a squabble. They didn't
2 like each other anyway. They were fighting over
3 women, cars, something, and it had nothing to do with
4 the SNM Gang. But we're going to tell you that --
5 here's the evidence. That's not what happened.

6 MR. BENJAMIN: Thank you, Your Honor.

7 THE COURT: It didn't. I mean, if we see
8 the pages, and all of a sudden down the road --
9 you're going to see them at some point, you're going
10 to see it as far as Jencks production, and that's
11 something different, then we'll have to deal with it
12 then. But I think you and I have enough experience
13 reading Grand Jury transcripts to know they're not
14 always presenting every possible theory from the
15 defendant's standpoint.

16 MR. BENJAMIN: Yes, Your Honor. But I
17 would -- the concern that I have here is,
18 essentially, at this point in time what I'm
19 understanding is I have two weeks to understand and
20 develop a defense to something that is a state case,
21 that I don't believe has any federal jurisdiction,
22 which concerns me from a time point of view.

23 THE COURT: Yeah. Well, I think you've got
24 all the discovery. You've seen the Government's
25 cards, as far as evidence. It doesn't sound like

1 you're going to get much more evidence out of the
2 Grand Jury. So I'll deny the request.

3 MR. BENJAMIN: Thank you, Your Honor.

4 THE COURT: You'll see them down the road.
5 So if there is problems with them, we'll have to deal
6 with them then.

7 MR. BENJAMIN: Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Benjamin.

9 All right. What I have next is
10 Mr. Garcia's and Mr. Troup's motion for -- the
11 Government's motion for notice as to Garcia and
12 Troup, 404(b), 405, 406, 608, and res gestae
13 evidence.

14 So you don't like this evidence?

15 MR. CASTLE: I don't like any of it that's
16 against my client.

17 THE COURT: Well, there is some out in the
18 world you like, right?

19 MR. CASTLE: Good character evidence, I
20 would appreciate.

21 THE COURT: Talk to me a little bit about
22 the evidence. Make sure I understand fully what the
23 Government wants to use against you.

24 MR. CASTLE: Well, I think that's the
25 problem. I don't know.

1 And just as a prelude, a number of
2 defendants joined in this motion, so --

3 THE COURT: You know, I don't have any
4 joinders on that. That may be true, but I don't
5 really have -- I mean, all I have is the Government's
6 motion.

7 MR. CASTLE: Well, I indicated in the
8 motion who was joining in that. So I probably should
9 have said it was Defendant Troup, Garcia's, and the
10 various other defendants that joined. But I think in
11 the concluding paragraph I indicated which defendants
12 joined.

13 THE COURT: Yeah. I mean, I've got --
14 okay. I've got Troup. So I've got -- so y'all are
15 joining this, right? But is anybody else joining it?

16 MS. HARBOUR-VALDEZ: Yes, paragraph 10
17 lists all the other parties who joined.

18 MR. MONDRAGON: Your Honor, I believe Mr.
19 Benjamin joined it, and we joined it.

20 THE COURT: Yeah, it looks like there is
21 more. I see paragraph 10.

22 MR. CASTLE: That was my fault, Your Honor.
23 I should have highlighted that in the beginning. The
24 problem is that when we circulate these motions, it's
25 done on behalf of two defendants. Then we hear --

1 THE COURT: No, that's fine. Don't worry
2 about it.

3 MR. CASTLE: Your Honor, in this notice, we
4 requested -- or in this motion we requested notice of
5 various types of acts of the defendant, uncharged
6 acts, which the Government intends to offer. And
7 we've described those as either character evidence or
8 res gestae evidence.

9 In the Government's response, Document
10 1102, they describe that as, essentially, evidence of
11 uncharged racketeering activity engaged in by the
12 defendants. And I think it really doesn't matter how
13 we characterize it. The due process requires
14 notice. Now, the Government has indicated the evidence
15 they'll present ordinarily would be -- well, in this
16 case it's going to be prior crimes or bad acts of the
17 defendants that are -- form their pattern of
18 racketeering activity.

19 But let's take a look at the indictment, if
20 we can. Because the indictment is where I think we
21 start. I mean, the Court's initial question was:
22 What are we talking about? And I said, I can't
23 answer that, because I don't know what they're
24 offering. That's because the indictment starts off
25 by essentially alleging that all these defendants are

1 members of the SNM; that's a specific allegation.
2 Then they say that the SNM Gang committed all kinds
3 of horrible crimes, including murder, robbery,
4 obstruction of justice, tampering with witnesses, et
5 cetera, and says that members or associates did these
6 things.

7 I'm not talking about the actual Counts, 1
8 through 16. I'm talking about uncharged activity.
9 And then they go throughout the indictment basically
10 saying that various defendants committed one or more
11 of these things: Murder, robbery, obstruction of
12 justice, et cetera.

13 So what we have here is a situation where
14 the defense doesn't know what this uncharged conduct
15 is. The prosecution is indicating it's part of their
16 allegations in this case, it's part of their proof of
17 the allegations.

18 THE COURT: You filed this motion. Where
19 did you get the idea they had this? Is this
20 correspondence? Discussions with them? How did you
21 get the idea that they had it? You're asking for a
22 notice that they didn't give you. Most of the time,
23 when I get a notice of 404(b) evidence, it's pretty
24 specific. It tees it up, whether the defendant wants
25 to try to exclude it or not exclude it. And

1 sometimes the Government knows it's going to be a
2 fight, and they just move on 404(b) notice to admit
3 the evidence. How did you come to the understanding
4 there is this ball of noncharged conduct that you're
5 going to have to deal with?

6 MR. CASTLE: Well, I got the idea based
7 upon two sources -- well, actually three reasons.
8 The discovery is replete with various allegations of
9 things our clients did.

10 THE COURT: There is just a lot out there.

11 MR. CASTLE: Right, there is a lot out
12 there.

13 Second of all, the nature of the indictment
14 is so broad that it really looks like the net is
15 being cast broadly. And the third thing is that
16 because this is a VICAR prosecution -- oftentimes, in
17 VICAR or RICO prosecutions, the prosecution likes to
18 put in a lot more evidence of acts that constitute
19 the pattern, more than what's been specifically
20 indicted. And so --

21 THE COURT: So you're afraid they're going
22 to bring the dump truck to trial, and just, anything
23 bad, unload against you?

24 MR. CASTLE: Yes, and their response
25 actually confirmed my suspicions. Their reply said

1 that's what they intend to do. And they think they
2 can do it, because it shows a pattern of racketeering
3 activity.

4 So now, it's more than one -- well, I'll
5 use an analogy using a different kind of animal, a
6 catfish. But there is more than one way to skin a
7 cat. And I could have filed this as a motion for a
8 bill of particulars. I could have asked for the
9 indictment to be dismissed. We asked for notice. I
10 think they all go to the concept of due process.

11 I would cite the Court to a case that I
12 didn't cite in the motion I filed, U.S. versus
13 Davidoff, a Second Circuit decision, 1988, 845 F.2d
14 1151. And that case dealt with the RICO prosecution.
15 And in that case, the defense skinned their cat in a
16 different way by filing a motion for bill of
17 particulars. What they were asking for was they
18 wanted to know if any uncharged acts of their clients
19 were going to be introduced at trial. And if so,
20 they wanted notice of that so they could defend
21 against that. Because they were fearful that de
22 facto clients would actually be convicted by a jury
23 mainly because of the uncharged misconduct in acts,
24 not the charged conduct.

25 And the Second Circuit indicated -- they

1 were talking about the principles of bill of
2 particulars in that case -- they said that "these
3 principles must be applied with some care when the
4 Government charges criminal offenses under statutes
5 as broad as RICO. With the wide latitude accorded
6 the prosecution to frame a charge that the defendant
7 has 'conspired' to promote the affairs of an
8 'enterprise' through a 'pattern of racketeering
9 activity' comes an obligation to particularize the
10 nature of the charge to a degree that might not be
11 necessary in the prosecution of crimes of more
12 limited scope."

13 They then went on to indicate that the
14 indictment in the Davidoff case only put the
15 defendants on notice to defend against the actual
16 predicate acts that were charged. They then went on
17 to say that at trial, "Davidoff was then confronted
18 with evidence of other crimes that were not charged."
19 And they said that that was violative of due process,
20 and reversed the conviction of Davidoff.

21 Now, why does this become important? I
22 want to give you an example. One of the allegations
23 here is that the SNM, and some of the defendants --
24 we don't know who they are, because they haven't
25 identified them in the indictment -- engaged in some

1 narcotics trafficking that had some kind of a role in
2 the SNM organization. And I think that's going to --

3 THE COURT: The Chris Garcia case.

4 MR. CASTLE: Right. And that's going to be
5 probably their link to the interstate commerce. But
6 that aside, they have broad allegations -- we don't
7 know who they're talking about.

8 Now, it might have been that -- I'll use my
9 client, I'll pick on him -- their evidence is that
10 Billy Garcia made a drug deal with some other person
11 in prison. If we don't know about that in advance,
12 and it turns out that that had nothing to do with the
13 SNM, it's just sprung on us at trial, the jury is
14 going to hear evidence. We're going to have to stop
15 the trial. We're going to have to do a hearing on
16 whether this is admissible evidence. And everything
17 is going to come to a grinding halt in trial.

18 That's why I believe the framers of the
19 rules, with regard to 404(b) specifically, required
20 advance notice so that litigation can settle whether
21 that's admissible or not.

22 I can tell the Court, when I looked at
23 discovery, the discovery doesn't say often -- it's
24 some old report from 2001, 2003, something of that
25 nature -- where they're getting intelligence

1 information on the SNM, and they'll get information
2 about particular defendants. And then, essentially,
3 they ask them: Well, what has this person ever done?
4 They say -- well, you don't know whether they've
5 heard it, or whether they haven't, whether they
6 actually were a percipient witness. And they'll say,
7 Well, here is the laundry list of bad things that guy
8 did. They don't necessarily link it to the SNM.
9 They just basically say: Because he's an SNM member,
10 he did all these things, and that's the information
11 they're going to provide. And I think that's what's
12 going to happen when we get the 302s and the Jencks
13 Act material. We're going to be stopping this trial
14 constantly because there is going to be objections
15 that this witness isn't necessarily a percipient
16 witness, doesn't have personal knowledge, that it's
17 not properly evidence of the racketeering activity,
18 that it's really 404(b) evidence, and we need to
19 analyze all the factors that we have to analyze in
20 404(b). And we're going to have stoppages constantly
21 through the trial. And it's going to chop everything
22 up.

23 It's interesting, what I think the
24 Government's position is -- and I think they can
25 describe it to the Court here in a minute -- but what

1 they're saying is that we have a right to know bad
2 acts under 404(b) that are outside of the indictment.
3 But what they're saying is we don't have a right to
4 notice of the bad acts that they are really saying
5 are within the indictment, that are part of the
6 pattern of racketeering activity of the defendants.

7 And that, to me, is illogical. I mean, due
8 process at its base requires a defendant to know what
9 crimes he's being accused of which are being a part
10 of the indictment and a part of the prosecution. And
11 their argument actually, in my opinion, helps us
12 more. Because if these are acts, these uncharged
13 acts, are actually part of their pattern of
14 racketeering activity, as alleged in the indictment,
15 then the need to give notice to the defense is even
16 higher than if it was mere 404(b) evidence, or other
17 character evidence that often comes up in the trial.

18 So, for the purposes of this argument, I'd
19 actually adopt their position, and say, okay, it's
20 all going to be that evidence, and they're indicating
21 that's all they're offering; they're not offering
22 404(b), or other kinds of character evidence, they're
23 offering it all as evidence that they're going to put
24 on, specific acts of the defendants, that will
25 demonstrate a pattern of racketeering activity. We

1 adopt that, I think the need for notice is greater.
2 And I don't think it's hard for them to produce this.

3 I would note to the Court that what the
4 Court might be thinking about is, Well, is the Jencks
5 Act disclosures that we're going to get in discovery
6 sufficient to put us on notice? The Davidoff case
7 said, No, it's not. And I think in this case it's
8 even greater. Why? Because the amount of material
9 we have is vast. I mean, if I'm not put on notice
10 for the next two weeks, I'm going to go through
11 discovery, and find every single thing they said
12 about Mr. Garcia, and file a 404(b) motion to exclude
13 it. Because I won't know whether they're going to
14 exclude it or not. That seems to be an incredible
15 waste, to define acts that they're going to put on
16 that these defendants did. I'm not asking for all
17 the evidence that they're going to put on concerning
18 the SNM and pattern of racketeering. I'm talking
19 about what these defendants --

20 THE COURT: You would like a list of --
21 saying: Here is what we're going to say bad about
22 your client?

23 MR. CASTLE: Right. These are the crimes
24 we're saying your client committed, so we can defend
25 against them. And those crimes are going to be part

1 of our proof that we're going to put on for the jury
2 as a pattern of racketeering activity.

3 THE COURT: All right. Anything else, Mr.
4 Castle?

5 MR. CASTLE: No, Your Honor.

6 THE COURT: Thank you, Mr. Castle.

7 Anyone else want to speak on this motion?
8 Ms. Johnson?

9 MS. JOHNSON: Thank you, Your Honor.

10 THE COURT: Are you one of the ones that
11 joined it?

12 MS. JOHNSON: Yes, we did.

13 THE COURT: Ms. Johnson. I was going to
14 let you speak anyway, but I just wondered.

15 MS. JOHNSON: Thank you, Your Honor.

16 We did join the motion. In the same vein,
17 Your Honor, in addition to the arguments propounded
18 by Mr. Castle, I would also note for the Court that
19 our motions in limine deadline is June 6. So, in
20 order for us to avoid peppering the Court and
21 opposing counsel with just vague motions in limine to
22 exclude certain evidence, we need to have a specific
23 list. Because, obviously, we're going to be filing
24 motions under Rule 403 to exclude certain evidence.

25 And, as the Court is aware, one of the

1 elements that the Government has to prove for these
2 VICAR counts is that, not only that there was an
3 enterprise, but that the enterprise engaged in a
4 pattern of racketeering activity.

5 So, obviously, in -- we anticipate in
6 support of their burden to prove pattern of
7 racketeering activity, they have to introduce
8 evidence, presumably, of some of these bad acts, of
9 these -- what, in a RICO, regular RICO case, would be
10 predicate acts. And so the defense has to have
11 enough time to review these, and determine whether or
12 not we need to file a motion to exclude, a motion in
13 limine to exclude.

14 As the Court I'm sure is aware, that
15 pursuant to HJ, Inc. versus Northwestern Bell
16 Telecommunications Company, which is a U.S. Supreme
17 Court decision from 1989, 492 U.S. 229, the pattern
18 of racketeering activity needs to be related. So we
19 can't just have a slew of bad acts, and have the
20 Government try to introduce evidence of these bad
21 acts in support of their pattern.

22 So, in order to expedite matters, in order
23 to save judicial resources, and save time, and not
24 have to file some vague motion in limine to exclude
25 just 403 -- evidence under 403, I would respectfully

1 request the Court order the Government to provide the
2 defense with a list of these bad acts that they
3 intend to introduce in support of their pattern of
4 racketeering activity. Because what's alleged in the
5 indictment is very vague, it's general. The counts
6 are VICAR counts. They may say, Well, that is --
7 those are the -- those acts are what form the pattern
8 of racketeering activity. I would respectfully
9 submit to the Court that that's different. They're
10 actually alleging those as substantive violent crimes
11 in aid of racketeering. And they need to prove the
12 pattern.

13 So I would ask that the Court order the
14 Government to disclose this information.

15 Thank you, Your Honor.

16 THE COURT: All right. Thank you, Ms.
17 Johnson.

18 Anyone else want to speak on it?

19 All right. Mr. Beck, are you going to
20 handle this?

21 MR. BECK: So I think it's important to
22 distinguish VICAR from RICO. In VICAR, the United
23 States is not required to prove that there was a
24 pattern of racketeering activity. The only element
25 that the United States is required to prove in

1 connection with racketeering activity is that the
2 charged enterprise engaged in racketeering
3 activity. So in talking about all these other bad
4 acts, the statute limits that. And if we look at
5 Section 1961, subpart 1, it defines racketeering
6 activity clearly. And so that activity, which the
7 statute defines as racketeering activity, is the only
8 information that we may bring in to prove that
9 element, which would then be res gestae.

10 I think that the way that the indictment is
11 charged, and the breadth of VICAR and RICO in
12 defining racketeering activity does -- indeed, I
13 agree with Mr. Castle -- render a lot of what may
14 otherwise be 404(b) evidence, prior bad acts.
15 Instead, res gestae of the crime, because it gives
16 the background of how the United States proves the
17 element that the enterprise engaged in racketeering
18 activity.

19 So I think that other contexts, certainly
20 what the defense is asking for, may be properly
21 subject to Rule 404(b). In this case, it is not.
22 Granted -- I mean, of course, the United States
23 understands that this Court still must determine that
24 it's admissible under Rule 403, as that's understood.
25 But the rules require the United States to provide a

1 list of Rule 404(b) activity it intends to present
2 against the defendant.

3 THE COURT: Well, the problem is that I've
4 got to sort of tee things up so that it's helpful to
5 me in making determinations that I can see are going
6 to come.

7 And Mr. Castle's point about, if we leave
8 all this dispute for trial, which is what I hear the
9 suggestion is, is we're going to take the position
10 none of this is 404(b). We're going to take the
11 position it's all res gestae, and so we don't have to
12 give it any notice under Rule 404(b(2)(A), then it
13 seems to me we're kicking the can down the road, and
14 we are going to make it more difficult to try the
15 case. Generally, we front-load this by pushing all
16 these issues to the motion in limine stage. So that
17 we can have a robust debate, I can give more informed
18 rulings, and the Government doesn't have to deal with
19 the evidence maybe being excluded because of lack of
20 reasonable notice. So my experience has been, with
21 the Government, is that the Government usually works
22 with everybody -- court, defendants -- to front-end
23 load the debate, so that we can tee these issues up.
24 It's not a matter of -- it's not a matter of forcing
25 the Government to give evidence. Because they've got

1 the evidence. They know everything that's bad in the
2 documents. It's instead saying: Here's the acts
3 we're going to prove.

4 How do you deal with just the practical
5 mechanics of what you're proposing, is that it's
6 going to delay the trial and take a lot of issues
7 that normally we deal with motion in limine and push
8 them to trial? It seems like that's not a good way
9 to run the trial from anybody's standpoint. And it
10 puts your evidence at risk of you guessed wrong, it
11 is 404(b), and not something that I consider to be
12 res gestae.

13 MR. BECK: Well -- and I certainly
14 understand the Court's position.

15 THE COURT: Why don't we do this: Why
16 don't you think about that over lunch. Think about
17 if you've got a proposal. Because I'm not forcing
18 you to produce evidence. I'm just saying, can you
19 list out for the defendant: Here's where we're going
20 to come after you at, I'm thinking of a single
21 sentence. And, that way, we can front-end load these
22 motions in limine. Because it seems to me we're
23 better off getting that decided before trial.

24 All right. Think about that over lunch.
25 See you in about an hour.

1 (The lunch was held from 12:31 p.m. to 1:52
2 p.m.)

3 THE COURT: All right. I was trying to
4 massage something from the Government. Was I
5 successful?

6 MR. BECK: You weren't. I understand --
7 you know, I mean, it's one foot or the other. The
8 rules are in place for a specific reason. Evidence
9 is either 404(b), or it's res gestae, or other
10 evidence. Where it is 404(b), the rules require the
11 Government to provide notice. Where it's not, there
12 isn't notice required.

13 And I understand Mr. Castle's arguments
14 that they're going to have to file a lot of motions
15 in limine. But a lot of these defendants in here --
16 most defendants have a couple of counsel. They've
17 reviewed discovery. What we're going to be using is
18 in discovery. And so I would assert that it's easier
19 for -- I'm not saying it's easy. But they're at an
20 advantage in filing those motions.

21 THE COURT: Why are they at an advantage?
22 You know what you're going to prove. Why are they at
23 an advantage?

24 MR. BECK: They have discovery. They know
25 what refers to their clients. They know the

1 discovery for their clients. And so, in preparing
2 for trial, they should be considering what evidence
3 they contend shouldn't be admitted. And instead of
4 three Government attorneys, who now have tons and
5 tons of obligations to review other evidence and
6 prepare Brady, Giglio, Rule 16 reviews, as well as
7 our motions in limine, our pretrial motions,
8 preparing those for all of the defendants, the rules
9 place the burden on the defendant to come forth and
10 object to that evidence. I think the motions in
11 limine are there for a reason.

12 Now, I anticipate that there will be
13 motions in limine. There will be some 403 rulings,
14 and some disputes. Whether it's res gestae or Rule
15 404(b), and I anticipate that there will be trial
16 briefing -- a trial brief -- that will lay out some
17 of these issues for the Court, so that if we get to
18 trial, and the Court's faced with an objection, the
19 Court will be educated on the issue from the trial
20 briefs.

21 So I'm not saying the United States is just
22 going to sit on its hands and wait till trial for the
23 Court and the United States to be bombarded with
24 this. I think it's ripe for a bench brief for trial.
25 So I don't want to give the impression that we're

1 just going to sit there, and trial is going to linger
2 on because of all these objections. I think that all
3 counsel here will educate the Court in preparation
4 for that trial and those issues.

5 And I'll reiterate, I don't want us to lose
6 focus, that certainly not everything is, perhaps,
7 Rule 404(b); that the statute makes clear what is
8 racketeering activity. And the United States has to
9 prove that the enterprise engaged in racketeering
10 activity. So --

11 THE COURT: Of the movants that are here in
12 paragraph 10 of their motion, the movants, how many
13 are in the first trial? That's going to require me
14 to make too much thinking.

15 MR. BECK: No, that's fine.

16 THE COURT: People were raising their
17 hands, and that is going to require me to think. It
18 looks like about three, four. Don't raise your hands
19 twice. If you're not in paragraph 10, don't raise
20 your hands. How many of you are in paragraph 10?

21 MR. BECK: It looks to me like there is,
22 four plus the movant.

23 THE COURT: So it looks like there is five.

24 All right. Anything else on this motion,
25 Mr. Beck?

1 MR. BECK: No, Your Honor.

2 THE COURT: All right. Thank you, Mr.
3 Beck.

4 Mr. Castle is teed up to argue it. Anybody
5 else want to say anything before Mr. Castle gets the
6 final word?

7 All right. Mr. Castle.

8 MR. CASTLE: I appreciate it. I don't get
9 the final word in my own home. It's nice to have a
10 place where I get it.

11 THE COURT: We all become litigators for
12 some reason.

13 MR. CASTLE: That's true.

14 What the Government is arguing is that the
15 burden should be on the defense to file motions in
16 limine. That would require two waves of them. One
17 based upon the discovery we have, and then second of
18 all, one that's based upon the disclosures that will
19 happen two weeks before trial. That would be two
20 different waves. The first wave would be
21 overinclusive because we'll be moving in limine to
22 exclude evidence that the Government has no intention
23 of even offering. So we're creating unnecessary work
24 for everyone involved.

25 And we have to remember that once, at least

1 on the briefing schedule that we have now, that takes
2 a while to get everybody briefed. I know the Court
3 could probably condense that.

4 But we're going to have a lot of work to do
5 in the last two weeks before the trial. The defense
6 attorneys are going to be scrambling to investigate
7 and analyze the disclosures that the Government is
8 withholding until two weeks prior to trial. That's
9 obviously their right, and the Court has given them
10 that authority. But I don't think that because they
11 created their own problems, because they've decided
12 not to disclose, that somehow that is a consideration
13 in deciding what's fair here.

14 I misspoke earlier when I said it was --
15 they had to prove pattern of racketeering activity;
16 they just have to prove racketeering activity. I'm
17 not sure that's a distinction, really, with much
18 significance for this argument.

19 Once again, the logic is that is faulty,
20 that because it's essentially acts that they're going
21 to prove to prove an element of the offense, they
22 don't have to give notice to the defense. That's --
23 I think I already argued it -- it's contrary to basic
24 notions of due process.

25 I don't know if the Court has any other

1 questions.

2 Oh, I did have one other comment. I think
3 there are cases in which the discovery and Jencks Act
4 disclosures could be enough. And the Davidoff case
5 talks about a couple of cases where that was enough.

6 But that's not the case here. We're not
7 talking about a illegal reentry, or, you know, a more
8 simpler -- a bank robbery case that's in federal
9 court, where it's pretty easy to figure out, okay,
10 they're going to bring in the prior two times the
11 person illegally entered the country or prior bank
12 robberies. Here, because the indictment talks about
13 everything from something as somewhat amorphous as
14 intimidation or tampering with witnesses, which can
15 mean almost anything in the context of a prison
16 setting, all the way to specific acts that they need
17 for a specific listing of what noncharged
18 racketeering acts our clients are being -- need to
19 meet at trial, I think is appropriate.

20 MS. JOHNSON: Your Honor, may I add
21 something?

22 THE COURT: Certainly.

23 MS. JOHNSON: Your Honor, if you take Mr.
24 Beck's argument that they have to prove racketeering
25 activity, and that's defined in 18 USC is 1961, but

1 if you look at the definition of racketeering
2 activity, it's extensive. It includes, I would say,
3 probably more than 50 offenses that could be
4 introduced to support the element of racketeering
5 activity.

6 And so what you're going to have is the
7 defense filing motions in limine that may waste the
8 Court's time and the parties' time. For example, had
9 I known, and had I had the courtesy of being told
10 that they weren't going to be introducing the
11 machete, I wouldn't have wasted the Court's time
12 asking for that information. So if we narrow down this
13 evidence, what acts are they going to introduce to
14 support the racketeering activity, it would narrow
15 the Court's focus, the parties' time. We're
16 essentially 60 days out, eight weeks out from trial.
17 Our motions in limine are due June 6.

18 So I would respectfully ask that the Court
19 order the Government to provide the defense with a
20 list of these acts that they're going to introduce
21 that would comprise the racketeering activity.

22 THE COURT: Thank you, Ms. Johnson.

23 Did you have anything else you wanted to
24 add, Mr. Castle?

25 MR. CASTLE: Your Honor, the parties talked

1 about timing of disclosures. But the parties did
2 discuss it during the lunch recess. We did not come
3 to an agreement -- I know that might be shocking --
4 but we had asked for 30 days prior to the motion in
5 limine deadline. Well, that was five days ago. So
6 that's not going to work.

7 My suggestion -- I would be amenable to one
8 of two situations, or suggest at least two different
9 avenues. In the Government's response, they
10 indicated that if the Court was going to order
11 disclosures, it should do that 30 days prior to
12 trial. If the Court were to do that, what we would
13 ask is -- that's also the deadline for motions in
14 limine. And we can't file a motion in limine on an
15 act that we just got notice of that day. So we would
16 ask for two weeks after that to file motions in
17 limine based upon that listing. Or, in the
18 alternative, which is a better alternative in our
19 opinion, is to order disclosure in 10 days, and then
20 we'd file our motions in limine 30 days prior to
21 trial as currently scheduled.

22 THE COURT: All right. Thank you, Mr.
23 Castle.

24 Well, here's what I -- at some point, I got
25 to think about my ability to manage this case. And

1 so I'm reluctant to kick the can down the road, and
2 to have a lot of issues in trial and trying to sort
3 it out there. I think you're going to get a
4 better -- I hope you'll get a better judge, and
5 you'll get a better judge trial, if I front-end these
6 issues, rather than kick them down the road.

7 And so I understand the Government's
8 position that there is no 404(b) evidence in this
9 case, or it's very little. But I'm reluctant to kick
10 that issue down the road and assume the Government's
11 case, knowing that I'm still going to have to decide
12 these issues; that these issues are going to have to
13 be raised. But at the same time, I don't want to put
14 the Government -- they may be right, and I think I
15 can figure that out pretty quickly.

16 So here's what I'm going to do: I'm going
17 to require the Government to -- we'll talk about what
18 this is going to look like, because I don't think it
19 needs to be much -- but I do think I need five
20 letters to the five movants that are in the first
21 case. Let's do a test run here. Let's see what this
22 looks like. Maybe with a heavy dose of guidance in
23 those cases that will be enough to solve things.

24 I think we made a lot of progress with some
25 early CIs, me sorting out sort of the legal

1 differences, and things like that. So I would
2 propose this: Let's not move the motion in limine
3 deadline. The Government give five letters in ten
4 days. Then the defendants get their motions in, make
5 them the best they can, based upon what it is. This
6 is what I'm expecting, is just a letter. We'll file
7 the letter. And just list it out. I mean, if you've
8 got a drug transaction, list it out. If you've got,
9 you know, something else: Guns, cellphones, whatever
10 sort of crime, wrong, or other sort of propensity
11 evidence.

12 I understand the Government's position, it
13 may be all res gestae. I understand their position
14 that it may go to proving racketeering activity. But
15 I'd like to have that list, and send it over. Those
16 defendants file their motions in limine. Let's get
17 after it. And we'll sort it out. And I think that
18 may give guidance to everybody else. And that way,
19 you don't have to do it on everybody. But we'll get
20 it started. And if we get into a roll, then I think
21 it's clear. If it looks like I'm having to make a
22 lot of individual determinations, then we may expand
23 the requirement. But let's give that a try.

24 Mr. Castellano.

25 MR. CASTELLANO: Your Honor, I just don't

1 know if we're going to be able to make 10 days. We
2 have a whole list of things the Court has already
3 ordered in this case in the next 10 to 14 days that
4 involves other discovery reviews.

5 The other issue that comes up is this may
6 force an early disclosure of Jencks material,
7 depending on what certain people say, and what that
8 evidence will be at trial. So we're going to run
9 into some other issues there.

10 THE COURT: Well, I don't think you have to
11 disclose any Jencks material. I'm not requiring you
12 to. But if you know that you've got -- if you know
13 in some of the Jencks material you know you've got a
14 bad act -- you don't have to disclose the sources of
15 it; I'm not requiring that sort of disclosure -- you
16 can just list it out. And the defendant can take
17 that and say it should be out. I mean, you've got
18 give them enough so they know what the incident is.
19 But you don't have to disclose any material with
20 this. I'm not requiring you to sit down and Bates
21 stamp it and things like that. Just give them a
22 sentence, but enough of a sentence so they know what
23 it is, so they can move on. Ten days isn't perfect,
24 but it's only five -- I think I'm going to stick with
25 that to keep these deadlines in place.

1 All right. The Government didn't like it.
2 You don't like it either, Ms. Harbour-Valdez?

3 MS. HARBOUR-VALDEZ: Your Honor, I'm happy
4 with that.

5 I just wanted to make a clarification.
6 There were two movants on this motion; that was Billy
7 Garcia and Edward Troup, and there were four others
8 who joined, so there are six total: Christopher
9 Chavez, Joe Gallegos, Javier Alonso, and Santos
10 Gonzalez.

11 THE COURT: All right. So I'll make it
12 six.

13 All right. Well, I've got to manage this
14 case. And this is where I maybe have an interest. I
15 think I can order it under the power of 404(b), that
16 it's got to be reasonable notice. So I think, if
17 we're going to litigate this issue, I've got to
18 impose my own idea of what reasonable notice is. So
19 I think that minimizes the burden to the Government,
20 and gets some of the issues teed up, so that we can
21 have a trial that can move along at a -- without
22 breaking up every few minutes to try to figure out
23 what the evidence is going to be.

24 So I'm granting that in part and denying it
25 in part, and some of it is without prejudice to

1 renewing down the road.

2 All right. Mr. Lowry, are you next? Ms.
3 Duncan?

4 This one is labeled as a sealed motion. Is
5 this going to be one of your motions, Mr. Beck?

6 MR. BECK: Yes, Your Honor.

7 THE COURT: All right. Is there anything
8 here that we need to be sensitive about in talking --

9 MR. BECK: I think the way that -- I think
10 the way I anticipate we're handling this will take
11 care of that. I think Ms. Duncan and I --

12 THE COURT: Y'all have agreed on it?

13 MR. BECK: Yeah.

14 THE COURT: Okay. All right. So
15 understanding it's sealed, and trying to be sensitive
16 to the Government's needs here, you want to state
17 your agreement, Ms. Duncan?

18 MS. DUNCAN: Your Honor, why don't I --
19 yeah, I can start, and then Mr. Beck can correct me
20 if I'm wrong.

21 My understanding of our agreement -- we've
22 agreed on everything except for three of my requests.

23 On our request B, which is on page 11 of
24 our motion to compel, this is a list of documents
25 relevant to a particular confidential informant. My

1 understanding is that the Government has agreed to
2 produce the records that we have requested with two
3 caveats. One is that we had asked for medical and
4 psychological records for this particular informant.
5 And the Government cannot disclose that to the
6 defense without a court order. So we'd be asking the
7 Court to order that, so it could be disclosed to us.

8 THE COURT: All right. Would y'all prepare
9 an agreed order?

10 MS. DUNCAN: We would, Your Honor.

11 The second part of it is, we'd asked for
12 prison phone calls and visitor logs for this
13 particular informant from February 1, 2005, through
14 September 14, 2016. The Government has agreed to
15 produce that, but they've asked that they be given 30
16 days to produce that part of our request, because
17 it's going to take some effort to put it together.
18 And we've agreed to that. The rest of the request
19 would be within the 14-day deadline that the Court
20 had issued earlier. But that particular part of the
21 request would be 30 days.

22 The next agreement -- and I'll just assume
23 that Mr. Beck will jump up.

24 THE COURT: He jumped up, but he sat back
25 down.

1 MR. BECK: Yeah, I wasn't sure if she
2 wanted me to jump up. And it's not a disagreement.
3 I think she just misstated the dates. It was
4 February 2015, and I think she said 2005. That's why
5 I sat back down. It was pretty semantic.

6 MS. DUNCAN: That's what I meant.

7 THE COURT: All right.

8 MS. DUNCAN: Our next request, which was
9 found on page -- actually there is three requests,
10 Your Honor, for three different confidential
11 informants. It's our requests C through E, found on
12 pages 12 through 13 of our motion. And it is my
13 understanding that the Government has agreed to
14 produce this information within 14 days, as it is
15 Giglio.

16 MR. BECK: And that's subject to,
17 obviously, the Court's Giglio ruling. We understand
18 how the ruling stands now. And we both agree that if
19 that changes, then that changes.

20 THE COURT: Okay.

21 MS. DUNCAN: The next is request number F,
22 on page 13 of our motion. And that was for
23 recordings of all phone calls involving Mr. Baca, and
24 also all recordings of video visits at the Dona Ana
25 County Detention Center. I clarified with Mr. Beck

1 that we're just asking for recordings that are in the
2 Government's possession. We're not asking them to go
3 get evidence for us. My understanding is the
4 Government has agreed that it will produce any
5 additional recordings of phone calls or video visits
6 involving Mr. Baca.

7 THE COURT: Is that your understanding as
8 well, Mr. Beck?

9 MR. BECK: Yes, Your Honor. I'm sorry, I
10 was just jumping up if I disagreed.

11 THE COURT: All right.

12 MS. DUNCAN: The next request we have is
13 our request G, which is on page 14 of our motion.
14 And that was for any tangible evidence or materials
15 the Government collected during the searches of Mr.
16 Baca's person or his cells over the years, and all
17 documents related to the collection of that evidence
18 or material. We have clarified with the Government,
19 we're just seeking documents that were collected
20 while Mr. Baca was incarcerated in the New Mexico
21 Department of Corrections. And with that
22 clarification, I understand the Government has agreed
23 to this request.

24 THE COURT: Is that correct, Mr. Beck?

25 MR. BECK: Yes, Your Honor.

1 THE COURT: All right. On request number
2 I, which is on page 16, Mr. Baca -- we've been able
3 to get that information, so it's now moot, and so Mr.
4 Baca has withdrawn that request.

5 For request number J, which is SNM
6 recording. There was disclosed in discovery a report
7 of an SNM yard recording allegedly between Mr. Baca
8 and Mauricio Varela. It's my understanding that the
9 Government has agreed to reach out to the Department
10 of Corrections to find out if it exists. And if it
11 does, to disclose that to us.

12 MR. BECK: That's right, Your Honor.

13 THE COURT: All right.

14 MS. DUNCAN: Request number K, on page 17,
15 was a request for all documentation related to the
16 transfer of Mr. Baca from Southern New Mexico
17 Correctional Facility to PNM Level 6 in August 2013.

18 The next request is for the same thing,
19 with a transfer from the same facility to PNM Level 6
20 in 2011. And the Government has agreed to disclose
21 that information to the extent that it already --
22 it's disclosed some information that's responsive to
23 these requests, Your Honor, but it's agreed to
24 disclose all information relative to these requests.

25 MR. BECK: That's right, Your Honor.

1 THE COURT: All right.

2 MS. DUNCAN: So that would be K and L. And
3 I think that is the extent of our agreement. There are
4 three things still outstanding.

5 THE COURT: All right.

6 MS. DUNCAN: I don't think we had an
7 agreement -- the last one was on the recordings of
8 Mr. Marcantel. We're going to argue that.

9 MR. BECK: Right.

10 THE COURT: All right. Do you want to
11 argue it?

12 MS. DUNCAN: So I'll start with our very
13 first request, Your Honor, which was on page 8 of our
14 motion. And, Your Honor, this is the request that we
15 argued yesterday with respect to Mr. Perez' motion to
16 compel. It's the recording devices that were used.
17 And I just -- I understand the Court has ruled, and I
18 just want to make a complete record --

19 THE COURT: Certainly.

20 MS. DUNCAN: -- on our request, because I
21 worry that I wasn't clear on what I was asking for,
22 and why I was asking for it.

23 What we're really seeking access to is the
24 metadata that are on the recording devices, data that
25 would show us whether -- not only whether the

1 recordings are the results of an informant turning it
2 on and off, or was a malfunction, but would also give
3 us information, such as the dates on which particular
4 recordings were made, and the time that those
5 recordings were made.

6 And that information is relevant to us,
7 Your Honor, because the way that the conversations
8 were recorded, they did start and stop in the middle
9 of conversations, and then they would resume. So
10 knowing that the conversations covered one topic, but
11 there was a three-hour break in-between is relevant
12 for us to determine whether or not these recordings
13 are fair and accurate. So if, for example, they
14 start talking about topic A; the informant turns off
15 the recorder, because he doesn't like what's being
16 said, kind of moves the conversation along, and turns
17 it back on a certain period later, that's exculpatory
18 and relevant to us in impeaching this particular
19 informant. And it's disclosable under both Brady and
20 Giglio. This is information that could be
21 exculpatory, but it certainly is relevant into the
22 impeachment, and it's covered by Rule 16(3)(1), which
23 allows examinations of items, where the items are
24 material to preparing the defense. And so we would
25 ask that we be allowed to have access to those

1 recording devices for those particular reasons.

2 THE COURT: I guess I was thinking these
3 are little bitty recording devices, after the
4 description yesterday. Do they actually generate
5 what I would think of in my civil discovery cases as
6 metadata?

7 MS. DUNCAN: Your Honor, I don't know. I
8 haven't seen the recording devices. I assume that
9 they're sort of like -- I have a digital recorder
10 that I use sometimes for interviews. And when you
11 look, the digital recorder does save metadata. If
12 you look at the recording, it will show you the date
13 and the time of the recording, in addition to the
14 length of the recording. So because I don't know
15 what recorders they used, I don't know if these
16 recording devices do the same thing. But I assume
17 that they do.

18 THE COURT: All right. Anyone else, any of
19 the defendants, before I hear from Mr. Beck?

20 All right. Mr. Beck, if you want to argue
21 on that. Do you know if these machines generate
22 metadata?

23 MR. BECK: I don't believe that they do. I
24 think -- again, I want to be careful here -- but my
25 understanding is that they don't. I think that,

1 probably, the Court's idea is probably more realistic
2 of what these devices are.

3 THE COURT: Would you be willing to check
4 after the hearing, and send Ms. Duncan a letter
5 saying yeah or nay?

6 MR. BECK: I will.

7 THE COURT: Copy me in as well.

8 MR. BECK: That's fine, Your Honor.

9 THE COURT: All right. Anything else on
10 that, Ms. Duncan?

11 MS. DUNCAN: No, Your Honor.

12 THE COURT: All right. Ms. Fox-Young wants
13 to, I think, help here.

14 MS. FOX-YOUNG: Your Honor, we would just
15 make the same request, that the Government check with
16 respect to the devices that we discussed and argued
17 about yesterday that were used to record Mr. Perez.
18 Our expert, in his declaration he spells this out,
19 does think that there is metadata that would be
20 useful for all the reasons that Ms. Duncan described.
21 And we'd like the Government to make the same inquiry
22 with respect to that device or devices.

23 MR. BECK: That's fine.

24 THE COURT: All right. Mr. Beck has agreed
25 to do that.

1 All right. Anything else, Ms. Duncan?

2 MS. DUNCAN: Not on that point, Your Honor.

3 THE COURT: All right. So at the present
4 time, I'm not going to order any production of the
5 machine. But if it doesn't produce metadata, then
6 that probably brings that inquiry to a conclusion.

7 All right. Ms. Duncan.

8 MS. DUNCAN: Your Honor, actually in
9 looking at my motion, I realize I skipped over some
10 categories of agreements that we had.

11 THE COURT: All right. Do you want to put
12 those on the record then?

13 MS. DUNCAN: Please, on page 9, we'd ask --
14 as we discussed yesterday, several of the informants
15 used Government-provided cellphones to record
16 conversations with other defendants and other people,
17 and text messages. And we'd asked for copies of all
18 text and photographs that were found on those
19 cellphones.

20 And speaking of Mr. Beck, the Government
21 has represented we have all the texts. And at this
22 point, we don't have anything to challenge that, so
23 we accept the representation.

24 We do not have all the photographs. So Mr.
25 Beck -- I think the agreement is that the Government

1 will produce whatever photographs are found on those
2 phones. Although there is a concern that the phones
3 may no longer be in the Government's possession. So
4 I think Mr. Beck was going to look into that, whether
5 these three cellphones were still in its possession
6 and let us know.

7 THE COURT: All right. Is that your
8 agreement, Mr. Beck?

9 MR. BECK: Yes, Your Honor.

10 THE COURT: All right.

11 MS. DUNCAN: With respect to the three
12 cellphones, if they are still in the Government's
13 possession, my understanding is the Government has no
14 objection to us doing a physical review of those
15 cellphones, along with our expert. And if they're
16 not in the Government's possession, we would
17 appreciate it if the Government would put that in
18 writing for us.

19 THE COURT: Is that your agreement, Mr.
20 Beck?

21 MR. BECK: Yeah, that's the agreement.

22 MS. DUNCAN: Then there was one last
23 category. There were three other categories of
24 information that we had asked for. It was
25 documentation related to the use of the recording

1 devices. We had asked for copies of logs or similar
2 materials documenting the use of those devices,
3 materials related to the instructions and monitoring
4 controls that were used by the FBI, Department of
5 Corrections or any agent of the United States
6 Government regarding the use of the cellphones by the
7 informants, cooperating witnesses, and logs or
8 reports of telephone calls between these cooperating
9 witnesses and members of law enforcement during the
10 period that they were -- the informants were
11 recording these conversations.

12 The Government has represented that none of
13 these materials exist; that the only sort of
14 instruction that were given were just verbal
15 admonishments by agents. I accept that
16 representation, but I'd ask that, should the
17 Government discover that that was wrong, that these
18 materials do, in fact, exist, that it alert us to
19 that fact, so that we can bring it to the attention
20 of the Court, and if the Government is not willing to
21 produce it.

22 MR. BECK: No objection.

23 THE COURT: All right. So ordered.

24 MS. DUNCAN: Your Honor, the next category
25 we disagree on is our request number H, which is at

1 page 15 of our motion. And we have requested housing
2 records for PNM Level 5 and PNM Level 6, from August
3 1, 2013, through March 8, 2014, which shows the
4 identity and location of all the inmates who were
5 housed at those facilities.

6 And we'd asked for this because the
7 Government's allegation, as we understand it, against
8 Mr. Baca in the Molina murder, is that Mr. Baca
9 somehow arranged for paperwork showing that Mr.
10 Molina was an informant, to be transferred from PNM
11 Level 6 to PNM Level 5, and then that paperwork was
12 transferred from PNM Level 5 to Southern New Mexico
13 Correctional Facility, which is where Mr. Molina was
14 murdered.

15 In order to rebut that allegation, we need
16 these housing records, because what they would show
17 is that Mr. Baca was not housed near any of the
18 people who were being moved between these different
19 levels, between PNM Level 6 and PNM Level 5. So that
20 the Government's theory doesn't hold water. So we
21 picked this period of time because Mr. Baca was moved
22 to PNM Level 6 in August of 2013. And then Mr.
23 Molina was murdered on -- I believe it was March 7.
24 So we're asking for the day after that murder.

25 THE COURT: All right. Mr. Beck?

1 MR. BECK: Your Honor, I think in their
2 reply the defendant responds that "the information
3 Mr. Baca seeks is necessary for him to establish his
4 location relative to others the Government alleges
5 were involved in the transfer of the paperwork at PNM
6 prior to the murder."

7 I think there is a more targeted way to do
8 that. And that would be to identify certain persons
9 that they believe -- I think this kind of goes back
10 to the first discovery motion we ever talked about,
11 which was that they identify suspects, and give us
12 articulable facts about who those suspects are, we'd
13 provide them with the information. I think that
14 would be a more targeted and proper request, as
15 opposed to this, which I view as a fishing
16 expedition.

17 So I think looking at all the housing
18 records from PNM Level 5 and Level 6 for almost an
19 entire year goes beyond what the criminal discovery
20 rules allow. That's a fishing expedition. I think,
21 if Mr. Baca can articulate certain persons he
22 believes are suspects, and request their housing
23 records, or perhaps request where they are in the
24 pod, in which pod, I think that may be a proper
25 request. But I think this request is overbroad under

1 the criminal discovery rules and Rule 16.

2 THE COURT: I would envision that, if you
3 were to get what you're asking, it would be a long
4 list of names, with some cells, and something like
5 that. It would be a lot of information. That's a
6 pretty broad period of time. I would think, if
7 you're going to raise the theory of somebody else did
8 this, that you've probably got a list of suspects,
9 right?

10 MS. DUNCAN: Your Honor, our theory is not
11 that somebody else did this, our theory is this never
12 happened. So, I mean, the Government has alleged
13 suspects in this case. But that's not really what
14 we're looking at. What we're looking at is it's not
15 possible. What the Government has alleged isn't
16 possible. And so the housing records would show
17 that. They would show that -- you know, they would
18 show that Mr. Baca was never next to any of the
19 people that the Government is alleging moved
20 paperwork from PNM down to Southern. But also that
21 the people who are next to Mr. Baca were never next
22 to the people who moved from PNM Level 6 down to
23 Southern. So that's why it is a broad net, but it's
24 because this allegation is somewhat amorphous.

25 And what I don't want to happen is we make

1 this defense at trial, and the Government comes up
2 with someone else who we weren't aware of and didn't
3 know who to ask for, who it was PNM Level 6 or PNM
4 Level 5 at the time. So this just gives us a full
5 picture of who was there. And that will enable us to
6 rebut this theory, which we believe is fundamentally
7 untrue.

8 THE COURT: Well, if you were at trial
9 today, and you wanted to make this argument to the
10 jury, how many examples would you want to go through
11 to show that this was impossible?

12 MS. DUNCAN: I think we could summarize.
13 We could summarize where people -- it's hard for me
14 to answer that question without knowing what the
15 populations were like. I think that the population
16 can be somewhat stable. So it may be fairly easy for
17 us to summarize this information in a way that the
18 jury could understand. But I think -- so this is
19 just knowing this whole period -- I mean, I think it
20 is a fairly easy request to fulfill. The Department
21 of Corrections keep these records. And it's really
22 up to the defense to distill it in a way that's
23 useful to us. But it's critical evidence for Mr.
24 Baca, given that this is the Government's sole theory
25 of how he's somehow responsible for the Molina

1 murder.

2 THE COURT: Well, I think it is an awfully
3 broad request. Here's what I'm inclined to do: Take
4 ten names that you think would be most likely in
5 play, and send them over. And, Mr. Beck, you give
6 the information for those ten people, rather than --
7 I don't know how many are there. And then, Mr. Beck,
8 if y'all decide you're going to throw in somebody
9 else, then I'll order the Government to disclose
10 that -- any additional names. If you look at the
11 list, and you think you're going to advance other
12 people, then you'll need to disclose that name and
13 provide that information. Otherwise, I think just
14 ten names, and I think you can make your point with
15 that. And the Government can't surprise you with
16 another name at trial.

17 MR. BECK: Understood.

18 THE COURT: All right.

19 MS. DUNCAN: I guess an alternative to that
20 request, Your Honor, then would be to ask for the
21 housing records for everyone, so from the same
22 period, August 1, 2013, until March 8, 2014, for the
23 pod at PNM North, where Mr. Baca himself was held,
24 which would tell us who was in that pod with him for
25 that certain period of time.

1 THE COURT: Well, let's do what I
2 suggested. I'll deny it without prejudice. Let's
3 see what this gets you. It seems to me that's a lot
4 of information, and I think you can make your point
5 that he just wasn't near anybody, with you selecting
6 some key people and making your point. And if
7 they've got somebody else that they think you were --
8 that was near Mr. Baca, then they need to tell you
9 that name. But he will give you ten, so that you can
10 say he wasn't near this person, wasn't near this
11 person, wasn't near this person. And if they're
12 going to come in and say, Yeah, but he was here,
13 they've got to give you that information.

14 MS. DUNCAN: Understood.

15 So we have one last request, Your Honor,
16 that's still in dispute. And that is, in March 2014,
17 shortly after the murder of Javier Molina, Mr. Baca
18 and other defendants were moved out of state to
19 out-of-state prison facilities. At the time of their
20 transfer, then Department of Corrections Secretary
21 Gregg Marcantel held some public speeches. First, to
22 Mr. Baca, Mr. Mauricio Varela, and I believe
23 Mr. Daniel Sanchez. And then to a bunch of other
24 inmates who the Government alleges are SNM members,
25 where Mr. Marcantel was lecturing about he perceived

1 to be their conduct, and what his expectations were
2 going to be in the future.

3 It's our understanding that --

4 THE COURT: These were prompted by what?

5 MS. DUNCAN: The murder of Javier Molina in
6 March 2014.

7 It's our understanding that these speeches
8 were video recorded as part of the Behind Bars
9 television A&E television series. So we've asked for
10 production of those, the videos of Mr. Marcantel's
11 meeting with Mr. Baca and other alleged members of
12 SNM at PNM. And this is relevant as Giglio. We
13 expect Mr. Marcantel to testify, the alleged victim
14 of -- I believe it is Count 9 of the indictment.

15 So it's information that's relevant to
16 impeach whatever testimony he may give at trial.
17 Because it's our understanding from other discovery
18 during these speeches, Mr. Marcantel made disparaging
19 remarks about Mr. Baca and others.

20 THE COURT: Mr. Beck, your thoughts?

21 MR. BECK: Well, I guess I don't see where
22 it's impeachment information. It seems like it would
23 be statements by Mr. Marcantel. If he is a witness
24 in the Government's case, I understand how that would
25 be Jencks material.

1 THE COURT: Is he likely to testify?

2 MR. BECK: I don't think we've made that
3 decision. But, I mean, we haven't ruled it out. So
4 I think, at this point, maybe 51 percent. So it's
5 pretty close. But he may be a witness.

6 THE COURT: In favor of testifying?

7 MR. BECK: Right, yes.

8 MS. DUNCAN: And, Your Honor, if I could
9 just respond briefly.

10 THE COURT: Did you have anything else?

11 MR. BECK: I don't think -- no, you weren't
12 cutting me off. I think I was done. I guess I'm
13 trying to put myself, in Your Honor's words, in the
14 shoes of the defense attorney. And I think Ms.
15 Duncan may help us with that. But I don't see how
16 disparaging remarks about a defendant and a prisoner
17 would be impeachment information. I guess it depends
18 on your view of impeachment information. But I think
19 that's the Government's position is, if he testifies,
20 it's Jencks. If not -- and I think it's -- if it was
21 on an A&E show, it seems like it could be gathered
22 from our sources. But I would trust that they've
23 probably explored that.

24 So I think that's all I have to say. I
25 think you begged me to go on longer than not. I'll

1 sit down.

2 THE COURT: All right. Thank you, Mr.
3 Beck.

4 MS. DUNCAN: Your Honor, it's classic
5 impeachment information. It's a Government witness
6 who is making biased statements against defendants in
7 this case. It shows his bias and his animosity.

8 THE COURT: What if they don't call him?
9 Then what is it?

10 MS. DUNCAN: Your Honor, then I think it's
11 relevant, it's potentially relevant to impeach other
12 Government witnesses. So Mr. Roy Martinez was
13 present during the second meeting with the larger
14 group, and made statements about his feelings about
15 what Mr. Marcantel had said. So having those
16 recordings potentially is impeachment of Mr. Martinez
17 about his representations about what happened during
18 that conversation, and also his reaction to Mr.
19 Marcantel's comments.

20 THE COURT: How many of these lectures or
21 speeches were there?

22 MS. DUNCAN: There were two. So there was
23 one that was with Mr. Baca and the other men who are
24 being transferred to out-of-state prisons. And then
25 the second one was with a big group of people who

1 were being left behind. And I believe they were on
2 the same day. It was March -- I don't have the date
3 in here -- but it was March of 2014.

4 MR. BECK: Your Honor, I don't want to cut
5 into Ms. Duncan. So I think some people at the table
6 are hearing what she's asking for. We don't believe
7 that recordings, audio or video, exist. We don't
8 believe A&E had begun recording at that point in
9 time. So it may short-circuit to just say that it's
10 the position of the United States that it's not in
11 the United States' possession, including NMCD. If
12 that changes, I will let Ms. Duncan and the Court
13 know, and we can come back.

14 MS. DUNCAN: Your Honor, just to add, I
15 think it's possible that it was recorded by a
16 Department of Corrections administration. It's my
17 understanding that there were recorders present. So
18 I assumed it was part of A&E, and that may have been
19 a mistake on my part. But I think, even if A&E
20 hadn't started filming, that it's still possible this
21 exists. So I'd ask the Government inquire of the
22 Department of Corrections whether or not the
23 administration recorded this as well.

24 THE COURT: Sounds like you're willing to
25 do that, right?

1 MR. BECK: Yes, Your Honor.

2 THE COURT: And you'll let Ms. Duncan know?

3 MR. BECK: I will.

4 THE COURT: If they exist, at the present
5 time, I'm not going to require their disclosure. I
6 think that it will be Jencks material, would have to
7 be disclosed with Jencks material, if Marcantel
8 testifies. I will ask you, if they exist, Mr. Beck, to
9 review them for any Giglio-Brady material. I'm like
10 you, I'm kind of hard pressed to see how they would,
11 just visualizing it. But look at them yourself, and
12 make a Rule 16, Giglio, Brady review, and see if
13 there is anything there.

14 MR. BECK: If they do exist, I'm happy to
15 talk with Ms. Duncan about that inquiry also.

16 THE COURT: All right.

17 MS. DUNCAN: Your Honor, I think that was
18 the last item of dispute.

19 THE COURT: All right. Thank you, Ms.
20 Duncan.

21 There was no reply to your motion, was
22 there, Ms. Duncan?

23 MS. DUNCAN: Yes, Your Honor, there was.

24 It is --

25 THE COURT: Yes, okay.

1 All right. Do you want to argue, Mr.
2 Lowry, your -- Mr. Baca's motion for a bill of
3 particulars?

4 MR. LOWRY: Yes, I do, Your Honor. And I
5 heard Your Honor's comments earlier today that you
6 hadn't -- given the way these were put on the
7 schedule, you might not have devoted the full
8 attention you normally do to these, so I don't know
9 if Your Honor has any questions or if it's helpful
10 for me to run through some of the underlying evidence
11 to tee this up for you.

12 THE COURT: Why don't you go ahead. I've
13 looked at them, but I haven't been able to study them
14 like I normally do.

15 MR. LOWRY: You know, before we start doing
16 this, Your Honor, could Mr. Beck and I approach, or
17 whoever is going to handle -- and this was, Your
18 Honor, part of the agreement about discussing CIs. I
19 don't want to discuss anybody unnecessarily, so I
20 would ask to approach.

21 THE COURT: Okay.

22 (The following proceedings were held at the
23 bench at 2:40 p.m.)

24 MR. LOWRY: Your Honor, there is a few
25 pieces of evidence in State Police reports that we'll

1 discuss. Eric Duran, I believe -- again, these are
2 my -- I strongly believe this -- they were disclosed
3 on the motion itself. But I have one that's going to
4 deal with Sammy Gonzales. I think was a state police
5 report. And they've been disclosed in evidence. But
6 I believe in the motion on confidential informants
7 that the Government indicated they weren't going to
8 use Sammy Gonzales in the case. So I don't want to
9 say his name unnecessarily. And if the Government
10 has any qualms about it, I'm not going to say that.
11 But I just want to make sure I'm not stepping out of
12 the bounds here, Your Honor.

13 THE COURT: Do you have any thoughts about
14 what you want, Mr. Castellano?

15 MR. CASTELLANO: If these are the only two
16 he's discussing -- I mean, for purposes of this
17 argument, we could just call them CW1 or 2 or CI-1,
18 CI-2.

19 MR. LOWRY: I'll just refer to everybody as
20 a confidential human source, Your Honor.

21 THE COURT: So you want to call Duran CI-1
22 and call Gonzales the CI-2.

23 MR. LOWRY: And there might be a Jerry
24 Montoya in there as well. I'll just -- as I refer to
25 different CIs, I'll just start in serial numbers.

1 THE COURT: All right.

2 MR. LOWRY: Don't hold me to that
3 particular list. But I won't mention anybody by
4 name.

5 THE COURT: I'm going to need to know to
6 make an informed decision. I don't know if y'all
7 want to give me a sheet of paper afterwards.

8 MR. LOWRY: I'll work with Mr. Castellano
9 and we'll do that.

10 THE COURT: Give me a sheet of paper like
11 we did in Chris Garcia's last week, so I can take it
12 back.

13 MR. LOWRY: I'm fine to do that. Thank
14 you.

15 (The following proceedings were held in
16 open court at 2:42 p.m.)

17 THE COURT: All right. Mr. Lowry.

18 MR. LOWRY: As Ms. Johnson pointed out,
19 this motion for bill of particulars deals with three
20 evidentiary items. And the first one is really how
21 to define what evidence constitutes an enterprise
22 here. And the reason we requested a motion for a
23 bill of particulars to identify this is to eliminate
24 undue surprise at trial, and really try to clarify,
25 with some certainty, what the Government's theory of

1 the case is, so we can prepare a defense as to the
2 enterprise element.

3 So this is just an example of a pattern
4 instruction for VICAR crimes. And you can see that
5 the Government bears the burden of proving the
6 existence of an enterprise. And, as we've talked
7 about -- and it came up throughout a number of
8 motions today, even the 404(b) motion -- that one of
9 the things that's concerned the defendants from the
10 start, and what I've briefed here, Your Honor, is it
11 appears that what the Government is attempting to do
12 is establish the existence of an enterprise by merely
13 showing a pattern of racketeering activity.

14 And if you look at the United States
15 Supreme Court opinions, and even circuit opinions,
16 the cases are very clear that in a limited number of
17 circumstances, that's permissible. But in a case
18 like this, it's not. And we cite the Tenth Circuit
19 opinion in U.S. v. King, and even the Boyle opinion
20 there is a footnote -- I believe, it's Footnote 4 in
21 the Boyle opinion, which really says, Look, if you're
22 dealing with different individuals at different times
23 and different places, it's not enough just to show a
24 pattern of racketeering activity; that you really
25 need to set -- prove the enterprise separate in

1 existence from that pattern.

2 And that's been an ongoing struggle in this
3 case to try to identify how or what enterprise the
4 Government is particularly talking about. And this
5 starts even in the second superseding indictment
6 itself. There is just not much in terms of clarity.
7 And if you look at this page -- it's paragraph 2 --
8 it says, "The SNM" --

9 THE COURT: This is the indictment you're
10 showing me?

11 MR. LOWRY: Yes, it is, Your Honor. This
12 is Document 949, at page 2. And this is sort of what
13 we see in terms of the definition of an enterprise.
14 And, you know, these are sort of the elemental pieces
15 of the enterprise definition: "An ongoing
16 organization that functions as a continuing unit with
17 a common purpose." What's left out of here is an
18 additional requirement that's set out by the United
19 States Supreme Court in Boyle, is that there be
20 interpersonal relationships between the memberships
21 in any kind of criminal enterprise.

22 So what the indictment went on to say --

23 THE COURT: That's certainly been added to
24 the conspiracy. Is it added to this as well?

25 MR. LOWRY: Well, the 4268 -- well, okay,

1 when you say "conspiracy," Your Honor, do you mean
2 the 1613 conspiracy?

3 THE COURT: That additional element that
4 you were asking. That's an element of conspiracy,
5 but has it been added to this as well?

6 MR. LOWRY: Well, this is the elements for
7 the definition of an enterprise. And so, with every
8 VICAR count in 4268, these are the defining elements
9 that the Government would need to prove.

10 It didn't give me a great deal of
11 satisfaction, but as I researched this issue, I don't
12 think the Government even bears the burden of proving
13 the existence of an enterprise in 1613. Because,
14 when you look at RICO conspiracy under 1962(d), it's
15 just whether the parties reached an agreement. It
16 doesn't even -- as long as there is agreement that's
17 reached, the existence or not of an enterprise
18 doesn't matter.

19 So when we talk about the conspiracy, I
20 just want to make sure we're seeing eye to eye on
21 which conspiracy we're talking about. We're talking
22 about a conspiracy to commit a VICAR count, yes,
23 these are the elements that the Government would need
24 to prove, but not necessarily for the 1613 case.

25 So what concerned me in this matter is the

1 part of the indictment that simply says that the SNM
2 is operated under a panel or mesa -- Spanish for
3 table -- of leaders, who issued orders to subordinate
4 gang members. That's the way, Your Honor, the
5 Government indicted this case. And this is what
6 apparently the Grand Jury had in mind when they
7 arrived at these VICAR crimes.

8 And this is important because it dovetails
9 with a lot of arguments you heard earlier from Mr.
10 Benjamin that, you know, are we here with appropriate
11 jurisdiction to listen to a federal criminal case,
12 rather than a string of state homicides? So in doing
13 so, the Government is saying, Well, all of these
14 crimes, these activities were done as part of the SNM
15 enterprise.

16 Now, what started giving me some pause and
17 some concern was looking at the evidence in this
18 case. And what we found, Your Honor -- and this is
19 attached to the motion -- and this is DeLeon Bates
20 No. 2665 -- is, as early as 2008, FBI Special Agent
21 Karen Kraft says that there is really four distinct
22 organizations of the SNM. And she refers to them as
23 The Founders, The All Stars, The Old Timers and The
24 Rejects. And it doesn't really bear on this motion,
25 but she goes through and identifies the various

1 individuals she thinks are associated with each
2 distinct group.

3 THE COURT: I've read that memo. Who is
4 the author of it?

5 MR. LOWRY: It was FBI Special Agent Karen
6 Kraft, Your Honor. And I believe we'll see in later
7 302s that she worked with the prosecution team, and,
8 in fact, worked with other members -- well, I'm
9 assuming -- I don't know about members currently, but
10 she was one of the initial FBI agents assigned to
11 this way back when they opened the serial number on
12 the SNM, which I believe, Your Honor, was in 2008.

13 Now, this particular document, I believe,
14 Your Honor, is based in part on an FBI 302, again is
15 attached at DeLeon 16194. And this was an interview
16 with a retired gang investigator from the Bernalillo
17 County Sheriff's Office, Robert Martinez. And Robert
18 Martinez -- then retired -- talked about the SNM
19 organization and how it came about. But the crux of
20 this, at page 3 of that -- and this is 16196 -- says
21 that "The organization started falling apart because
22 some of the very young inmates were given the
23 opportunity to run the SNM at prison facilities."
24 And he goes on to say -- and I'll characterize
25 this -- but he basically draws a distinction from a

1 generational standpoint, that the younger inmates
2 coming into the facility didn't heed or didn't really
3 live up to the creed, if you will, of what they
4 believe the SNM to be, as alleged by the Government.

5 And one of the things I wanted to say here
6 at the onset of this, Your Honor, I'm going to refer
7 to the Government's discovery. Just to keep me from
8 saying "as alleged by the Government," if we can
9 assume that; I don't want to concede the existence of
10 an enterprise called "the SNM." But that's what the
11 Government has alleged. And as I refer to these, I
12 don't want my shorthand version of a reference to be
13 misconstrued as a concession that an enterprise known
14 as "the SNM" actually exists.

15 But what Mr. Martinez says is -- again,
16 that one of the things that happened is separate
17 organizations started branching out, one known as The
18 All Stars. And The All Stars operated in a
19 completely different fashion. And he starts
20 describing this; "that they would tolerate,
21 apparently, anyone to order random hits without going
22 through any kind of structure or leadership
23 channels." And in Mr. Martinez' words, the lack of
24 recruiting standards for what he believed to be the
25 original SNM enterprise, as alleged by the

1 Government, was the beginning of the demise of the
2 SNM. And realize that this is in 2008, when he's
3 saying that this organization that the Government
4 believes exists as SNM had been falling apart,
5 fracturing, disintegrating into various subgroups,
6 which the FBI then described in the first exhibit as
7 attached to the memo as The Founders, The All Stars,
8 The Old Timers, and The Rejects.

9 THE COURT: Could I finish reading that?
10 I'm a little slow there.

11 MR. LOWRY: Sure, Your Honor. And this is
12 attached to -- and again --

13 THE COURT: Okay.

14 MR. LOWRY: As you can see, Your Honor,
15 part of Mr. Martinez' assessment of the generational
16 discrepancies between alleged memberships and
17 members, was that, in his view, the olders -- The
18 Founders, if you will, would never cooperate with the
19 Government; whereas, the new kids on the block, for
20 lack of a better term, would cooperate with the
21 Government rather than being sent back to prison.

22 So this just continues through the
23 discovery. And again, this is Exhibit 3 attached to
24 the motion, and if you look at Bates No. 15418 in the
25 DeLeon. And this is a confidential human source that

1 the Government has redacted -- we'll refer to this as
2 CHS-1, Your Honor -- recognizes the existence of
3 these individualized cliques. And this informant
4 says, "Currently, each SNM clique is giving its own
5 instructions for issuing hits, which is putting some
6 members in very compromising situations. For
7 example, Archuleta is currently in a compromising
8 position within the SNM, because he issued an order
9 to hit SNM member, only known as Junior, without
10 approval from other SNM leaders."

11 Why these are critical, Your Honor, is it
12 goes to show one of the things we've been struggling
13 with is there is really no structure in this
14 allegedly described enterprise. It's an
15 association-in-fact enterprise. And there is no
16 structure because it has devolved into various
17 factions, subgroups, however you want to characterize
18 it, but it's not an overarching continuing unit with
19 interpersonal relationships as federal law requires.

20 To just drive home this point, Your Honor,
21 this is, again, a piece of discovery under DeLeon,
22 Bates No. 12963. And I'll refer to this exhibit as
23 CI-2, where CI-2 -- this is dated March 17, 2014, and
24 this was an interview done by the Corrections
25 Department, in the wake of the Javier Molina murder.

1 And this particular CI, who the Government said
2 they're not going to call as a witness, tells the New
3 Mexico Corrections Department that he was getting
4 tired of this SNM politics because nobody knew what
5 was going on, and there is no structure and
6 leadership. And this is from somebody we believe who
7 was in the genre, perhaps, of a founding member.

8 So what you see throughout the discovery,
9 Your Honor, is a lack of distinct structures, a lack
10 of any kind of ability for an organization that's
11 characterized as an enterprise to operate, much less
12 operate as a continuing, functioning unit. And
13 that's critical. And that's exactly why we need a
14 bill of particulars in this case, Your Honor.

15 This all came to a head on November 28 at
16 the hearing to cordon off Mr. Baca in the courtroom.
17 The FBI testified -- and it's set out in the brief,
18 and I can put that up on the Elmo, if you'd like --
19 but they really had no idea -- they were questioned
20 on this idea that there was a tabla running the
21 alleged SNM criminal enterprise, as set forth in the
22 indictment. And what the testimony was, that they
23 didn't know there was a tabla in 2015. And when I
24 asked if there was tabla in 2014, they didn't know.
25 And what eventually was conceded is over various

1 periods of time, throughout the history of the
2 organization, efforts were made to create this tabla
3 and place individuals on it. And as far as the exact
4 time periods -- I can't give you the dates -- but at
5 certain points, based on our understanding, that
6 tabla did exist.

7 Well, that is, in my view, Your Honor, far
8 too vague, far too amorphous, far too nebulous to
9 constitute the discrete, the definite, and certain
10 information that Mr. Baca needs to defend himself
11 against the allegation that a criminal enterprise,
12 known as the SNM, existed under the definition -- the
13 legal definition of an enterprise, that requires --
14 as we set forth in the brief -- requires at least
15 three critical elements. It requires interpersonal
16 relationships between the members of the enterprise.
17 It requires that those individuals share a common
18 interest. And, critically, it requires that those
19 individuals function as a continuing unit over time.

20 And what we've seen in the small tip of the
21 iceberg of the discovery is that simply was not the
22 case. That this was a fractured -- you know, I hate
23 to use allegedly fractured organization, if you will,
24 that was comprised of subgroups.

25 In the Government's reply they describe the

1 leadership as fluid, based on the exhibits we
2 described. And that's exactly the problem, that we
3 can't go to trial under a mercurial, fluid, amorphous
4 set of facts, not knowing how or what the Government
5 is going to do to prove the existence of an
6 enterprise.

7 This sort of goes to the point Mr. Benjamin
8 was making in his argument for disclosure of the
9 Grand Jury testimony, is he wants to know how his
10 client could have done this particular act as part of
11 the enterprise. And he was saying, rightfully so,
12 that he was afraid of his client getting tainted with
13 other predicate acts that the SNM has done in front
14 of a jury, because that jury will look unfavorably
15 towards his client after hearing a lot of prejudicial
16 evidence.

17 Well, the flip-side of that also holds
18 true, Your Honor. Hypothetically, if one would
19 concede being a member of the SNM, that individual
20 doesn't necessarily want to get prejudiced by Mr.
21 Gallegos' actions that have nothing to do with the
22 SNM. So there is a problem here. And I think all of
23 the defendants need to know exactly what kind of
24 enterprise we're talking about, in terms of how it
25 functions. And just to say, as apparently the

1 Government is saying, that there is a pattern of
2 racketeering activity is insufficient under the law.
3 And we cited in our reply brief -- I believe it's the
4 case of Bailey, which another district court judge
5 did the same thing -- it's Bailey, at 689 F.Supp.
6 1463 -- that the judge in that case ordered a bill of
7 particulars to describe how an association-in-fact
8 enterprise functioned to give the defense an
9 opportunity to fashion and marshal its evidence.

10 Your Honor, one of the reasons I jumped up
11 when Ms. Duncan was arguing the motion to compel,
12 Your Honor, was saying, Well, why doesn't the defense
13 send a list of ten names over to the Government, so
14 the Government can have some sense of, you know, what
15 names you might think could have been involved in the
16 couriering of information. And the point I'm making
17 in my reply brief, Your Honor, at page 3, is this
18 really isn't a defense burden. And other courts have
19 so stated. And again, Mr. Baca bears the presumption
20 of innocence. And on page 3 -- this is the United
21 States v. JM Huber Corp., at 179 F.Supp. 570, and the
22 court -- I'm going to quote the court, "Being
23 presumed to be innocent, it must be assumed that he
24 is ignorant of the facts on which the pleader founds
25 his charges. It must never be forgotten that what is

1 sought by a bill of particulars is not what actually
2 happened but what the opponent claims happened."

3 And that's exactly where we stand in this
4 case. It's not enough for us to surmise or
5 conjecture or guess, in order to defend Mr. Baca. We
6 need to know with certainty in more of a definitive
7 nature of what or how the Government intends to show
8 an association-in-fact over the course of years.

9 THE COURT: Well, but that's what I think
10 is the difference. I don't disagree with what you
11 read about a bill of particulars. You want to know
12 what they're charging. But then you shifted it
13 slightly when you said: What we need to know with
14 certainty is how they're going to show it. Those are
15 two different things. And that's the problem I'm
16 having with some of the defendants' requests, is the
17 theory seems pretty clear to me.

18 I mean, I've had cases where I can't figure
19 out what the Government is alleging. But that
20 doesn't seem to be the case here. It seems to be
21 these are being used more as discovery tools, in
22 various forms. We've done different motions. So
23 when you shifted it; you read the statement, then
24 shifted it, that's the problem I'm having today.

25 MR. LOWRY: If I shifted, Your Honor, I

1 apologize. It wasn't intended to be a shift.

2 My problem is this: The Government clearly
3 in the indictment says the SNM is run by a tabla.
4 And when you put a Government agent on the stand
5 under oath and saying:

6 Was there a tabla in 2015?

7 They say, I don't know.

8 Was there one in 2014?

9 I don't know.

10 THE COURT: Well, let's say they don't have
11 any evidence of a tabla. What do I do with that with
12 a bill of particulars?

13 MR. LOWRY: Well, if they don't have any
14 evidence -- this is a very interesting point, Your
15 Honor, because when Mr. Benjamin asked for his Grand
16 Jury transcript, which the Government said, Well,
17 what he needs to do is ask for a bill of particulars.
18 Well, I'm up here asking for a bill of particulars.
19 But what you're describing is, if there is none, I
20 want to look.

21 THE COURT: Put the Government's arguments
22 aside. How is a bill of particulars going to help
23 you with the tabla? If they're going to have
24 witnesses come in and agree that, at certain points,
25 particularly late in this -- in what they've alleged

1 is a racketeering enterprise, they didn't have an
2 organization that looked like it did earlier in its
3 existence, what do we do with that as far as a bill
4 of particulars are concerned?

5 MR. LOWRY: Well, Your Honor, this is the
6 problem: What tabla? For what organization are we
7 talking about?

8 Now, I don't doubt that the Government is
9 going to come in with a series of confidential human
10 sources that say, at a certain particular time, there
11 was a tabla that existed in this institution, and
12 here's who was on the tabla. Frankly, I've never
13 seen any continuity between CHSs on who was on the
14 tabla.

15 But we'll set that aside. What you're
16 asking me is this discovery motion, I'm saying no,
17 but what we need to know with some certainty is,
18 there is a tabla. But my question and my problem
19 with defending Mr. Baca is this -- and this is why I
20 think the identities of the people on the tabla is
21 critical, Your Honor -- was this a tabla for, quote,
22 "the SNM," allegedly, or was this a tabla for -- as
23 the FBI recognized, is this a tabla for the original
24 founders? Or this is a tabla for The All Stars? Or
25 is this a tabla for The Old Timers? Or is this a

1 tabla for The Rejects? And the reason this is
2 important is one of the -- Mr. Martinez describes in
3 his memo in his statement to the FBI is The All
4 Stars, for instance, had a motto, and their motto
5 was -- no, I don't believe it was Mr. Martinez, but
6 it's one of the exhibits, Your Honor; I can go get
7 it. But one of the confidential human sources told
8 the FBI and told the Government that the motto of The
9 All Stars was: "In with the new and out with the
10 old." And The All Stars had a mission which was to
11 kill, frankly, and put hits out on all of the
12 original founding members in The Old Timers, so they
13 could eliminate competition.

14 And so when we are talking about was there
15 a tabla, this is the crux of the problem. A tabla
16 for who? A tabla for what? And there is a
17 difference between a tabla, just like I pointed out
18 in the motion. There is a difference between being a
19 senator in the United States Congress and a senator
20 in the New Mexico Legislature. And that's the
21 problem we have with this whole tabla concept.

22 THE COURT: But, see, that sounds to me
23 more like a closing argument than it does a bill of
24 particulars. I mean, it just sounds like you figured
25 out what you're going to argue to the jury, and tell

1 them that: There is no organization here. Everyone
2 in this room is just an individual, and there was no
3 organization at all.

4 MR. LOWRY: Well, that may be true, Your
5 Honor. But then that begs the question of how the
6 Grand Jury came to indict this case. And if the
7 Grand Jury was confused or mislead or just befuddled
8 about what SNM organization they were cuing up for
9 criminal federal prosecution, you know, I would
10 wonder -- and what I see happening here is, frankly,
11 that may be an argument one can make to the jury.
12 But that also might be an argument one would want to
13 make a directed verdict. And I think what's going to
14 happen here is there is going to be a huge mishmash
15 of confusion. And in order for Mr. Baca to present
16 an effective defense, we need to be on this today,
17 not as the trial develops, unfolds before us. I
18 don't think this is going to be the type of thing
19 that, one -- I mean, we're already hearing about a
20 number of, you know, Jencks productions. I think Mr.
21 Castle pointed out, and the Court recognized how
22 crushing this motions practice is going to be on the
23 eve of trial, as we're given Jencks Acts and other
24 things.

25 And what I hear the Court suggesting is,

1 Well, you can develop that during the course of the
2 trial. Well, that's -- you know, just defending Mr.
3 Baca at this trial is going to take an inordinate
4 amount of energy and time. And I would rather have
5 that kind of investigation done before trial starts,
6 not during the middle of trial.

7 So I don't -- again, if you look at the
8 case law, and you look at other judges have done just
9 this, saying: We think a bill of particulars is
10 appropriate when we're talking about an
11 association-in-fact, because, as the United States
12 Supreme Court said, just establishing a series of
13 predicate acts isn't sufficient. And especially not
14 sufficient here when you have predicate acts that
15 span over the course of, you know, some 15, 16, 17
16 years that involve wildly different groupings of
17 individuals that, as far as I can tell, have nothing
18 to do with each other over time, with their
19 particular predicate act.

20 So I would rather get some clarity on this,
21 Your Honor. And I don't think it's really fair to
22 the defense to say, Well, we're not bound to give you
23 clarity. You can do just what we do. We just guess.
24 We just think it's fluid. And you've just got to
25 roll with it. I mean, to say it's fluid begs the

1 question of whether the enterprise exists.

2 THE COURT: Well, isn't the reality,
3 though -- I mean, I'm not the judge of the facts, but
4 I mean, it sure seems to me that, as the men aged,
5 The Founders, the organization changed. And that
6 doesn't strike me as startling observation. That's
7 often what happens in churches, nonprofits, prison
8 gangs; you know, they change over time, and the young
9 bucks sometimes toss out the older guys. It happens
10 at law firms.

11 MR. LOWRY: Don't say that, Your Honor.

12 So I guess, you know, you call it fluid. I
13 just call it a bit of an evolution in the
14 organization, which is not unexpected over time.

15 MR. LOWRY: Taking that analogy, Your
16 Honor, I think what I'm trying to suggest, at some
17 times the young bucks just say, We're not going to
18 stay at this law firm, and branch out and start their
19 own law firm. And that's my concern here. It's not
20 that --

21 THE COURT: But how do I address it with a
22 bill of particulars? I mean, what do I tell the
23 Government to do? If they're going to be very open
24 about the fact that the organization has changed; at
25 one time there was more rigid structure, or a more

1 identifiable structure, how do I -- what do I --
2 that's their theory.

3 MR. LOWRY: That's their theory, Your
4 Honor. But I think it's not enough to have a theory.
5 And I hope the Grand Jury had more than a theory. I
6 would hope the Grand Jury had some evidence to back
7 that theory up.

8 THE COURT: Let's do this: I don't want to
9 cut you off, but I'm under pressure from a Chief
10 Judge, and probably more important, from Ms. Wild, as
11 we got a big event here tonight in this building.
12 Everybody -- well, I can't say everybody is invited,
13 but --

14 MR. LOWRY: Mr. Baca would love to be
15 there, Your Honor.

16 THE COURT: I don't have enough food for
17 everybody. But certainly the lawyers are invited,
18 and they've been told about it. But I've got to --
19 the Chief didn't want me to go this afternoon, but I
20 did go this afternoon, so I'm pushing it.

21 Let's break, be back at 8:30 tomorrow.
22 I'll let you continue to make your argument.

23 Think about, though, what I'm saying. I'm
24 trying to -- you know, I understand. When we're
25 going after -- if you don't want to listen to me, at

1 least let Ms. Bean hear -- we've really got to focus
2 on what I can do with a bill of particulars. I mean,
3 I hope that people have picked up I'm sensitive to
4 trying to get information, evidence into the
5 defendants' hands. But I'm having a little hard time
6 with some of these tools, whether it be bill of
7 particulars, Grand Jury, or other things that are
8 seen more as maybe discovery devices. So think about
9 what a bill of particulars -- how it really helps you
10 with the situation here.

11 Let me ask a question. If I could get
12 everybody's attention for a second. Do we need the
13 Baca people tomorrow? Is there -- I'm sitting here
14 looking at Mr. Lowry's motion here, and then we've
15 got one more that's the -- Mr. Benjamin's motion on
16 behalf of Mr. Gallegos to sever. So it seems to me
17 that we're getting really into DeLeon stuff, and I'm
18 not seeing the Baca stuff. I don't want to exclude
19 people that want to be here. But is there anybody in
20 the Baca case that can foresee how the discussions
21 that I'm having with Mr. Lowry, I'm going to have
22 with Mr. Benjamin tomorrow on the motion to sever,
23 how the Baca people need to be here, want to be here?
24 Is there anybody that feels like they need to be here
25 for constitutional purposes or any other purpose? I

1 don't want to cut you loose.

2 THE COURT: Mr. Assed?

3 MR. ASSED: On behalf of Mr. Archuleta, I'd
4 like to be here, Judge.

5 THE COURT: All right. Let's just leave
6 everybody here. I don't think it's going to be a
7 long day. So let's just leave everybody coming back.

8 Let me ask y'all to begin to think, though,
9 because I'm going to stay working on this case for a
10 while. Sorry, Ms. Sirignano, Mr. Adams, Mr. Garcia,
11 I'm going to put yours aside. I'm going to work on
12 this case. So be thinking of giving me a batting
13 order. If you thought that there were some things I
14 was either tentative about, you want me to take a
15 closer look at, give me a batting order what you want
16 me to work on, so that when I leave here, we all
17 leave tomorrow, I know exactly what I need to do and
18 need to work on to give you as much guidance as I can
19 for the trial.

20 All right. Mr. Jewkes?

21 MR. JEWKES: And, Your Honor, I presume
22 that we are still scheduled for next week?

23 THE COURT: Yes, we are.

24 MR. JEWKES: On the 19th, on DeLeon.

25 THE COURT: Let's leave it scheduled, and

1 let's let Ms. Wild sort that out with you. I know
2 there are still a lot of motions here that were not
3 teed up. So let's leave that in place for the time
4 being.

5 Did you have something, Mr. Cooper?

6 MR. COOPER: I was just trying to listen.

7 THE COURT: Just trying to listen. All
8 right.

9 Mr. Lowry?

10 MR. LOWRY: Your Honor, one housekeeping
11 matter. Because we attached discovery to the 4268
12 motion, my bill of particulars motion, we filed it
13 under seal, may we share that particular set of
14 briefing with -- just briefs -- with the individual
15 parties in 1613?

16 THE COURT: 1613 would be the Baca case?

17 MR. LOWRY: Yes, Your Honor.

18 MR. BECK: We don't oppose that, Your
19 Honor.

20 THE COURT: Okay. All right. Anything
21 else from the Government we need to discuss before we
22 take our break? Ms. Armijo?

23 MS. ARMIJO: No, Your Honor.

24 THE COURT: Any other defendants for
25 tonight?

1 See you at 8:30, then, tomorrow. Have a
2 good evening. Appreciate your hard work.

3 (The Court stood in recess.)
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SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492



MAIN OFFICE
201 Third NW, Suite 1630
Albuquerque, NM 87102
(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com

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UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on May 19, 2017.

Jennifer Bean, FAPR, RMR-RDR-CCR
Certified Realtime Reporter
United States Court Reporter
NM CCR #94
333 Lomas, Northwest
Albuquerque, New Mexico 87102
Phone: (505) 348-2283
Fax: (505) 843-9492

SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492

**BEAN
& ASSOCIATES, Inc.**
PROFESSIONAL COURT
REPORTING SERVICE

MAIN OFFICE
201 Third NW, Suite 1630
Albuquerque, NM 87102
(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com